SH-v-Department for Communities (IS) [2020] NICom 30

Decision No: C1/20-21(IS)

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

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

**INCOME SUPPORT**

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 10 April 2018

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 Belfast.

2. For the reasons I give below, I grant leave to appeal. Under Article 15(8)(b) of the Social Security (NI) Order 1998, I allow the appeal. I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

## REASONS

### Background

3. The applicant claimed income support (IS) from the Department for Social Development, now known as the Department for Communities (the Department), from 16 October 2007. The claim was made on the basis that she was a lone parent. On 3 August 2015 the Department decided that the applicant did not satisfy the conditions of entitlement to IS from and including 16 October 2007 on the grounds that she was living with her husband and did not satisfy the condition of entitlement as a lone parent. The Department further decided that IS amounting to £27,405.70 had been overpaid to the applicant for the period from 16 October 2007 to 11 April 2014 and that it was recoverable from her, as she had misrepresented the material fact that she was a lone parent. The applicant appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. After a hearing on 10 April 2018 the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 15 November 2018. The applicant 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 16 January 2019. On 12 February 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

**Grounds**

5. The applicant submits that the tribunal has erred in law on the basis that:

   (i) it had failed to make findings of fact in relation to the evidence given by the applicant and failed to give adequate reasons for its decision;

   (ii) it made perverse and irrational findings;

   (iii) it failed to keep an adequate record of the proceedings;

   (iv) it failed to identify the misrepresentation that formed the basis of its decision.

6. The Department was invited to make observations on the applicant's grounds. Ms O'Connor of Decision Making Services (DMS) responded on behalf of the Department. Ms O'Connor submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

**The tribunal's decision**

7. The LQM has prepared a statement of reasons for the tribunal's decision. In this the tribunal describes the documentary evidence before it as "Submission Papers". From this I understand that the tribunal had material before it consisting of the Department's submission of 23 October 2015, containing miscellaneous evidence including applications to financial institutions, social media screenshots and the transcript of an interview under caution. The tribunal also had the submission made by the applicant's representative in response to a tribunal direction and two "supplementary response" documents from the Department, containing further evidence.

8. The applicant attended the tribunal hearing to give oral evidence through an Arabic interpreter, Mr Ramzy, and was represented by Mr Allamby, in the capacity of a volunteer with Law Centre NI. The Department was represented by Mr Chapman. I understand that the parties and the

tribunal agreed to proceed by way of the applicant adopting the written submissions of fact advanced by her representative, with the representatives and tribunal asking mainly supplementary questions.

9. The tribunal considered that the evidence before it established that the applicant's husband, who I will subsequently refer to as "A", had been living at the same address as her and that on the balance of probability they had been living together as a couple. The evidence relied on included birth certificates, bank statements and applications, a driving licence application, a Facebook page and a housing benefit (HB) claim. The tribunal found that the couple maintained separate addresses only as a convenience to secure additional income by way of IS. The tribunal decided that the applicant had been overpaid IS amounting to £20,689.55 and that £19,265.50 of this was recoverable from her.

**Relevant legislation**

10. The relevant legislation affecting entitlement in this case is section 133 of the Social Security Contributions and Benefits (NI) Act 1992 (the 1992 Act) and regulation 2 of the Income Support (General) Regulations (NI) 1987 (the IS Regulations).

11. Section 123(1)(e) of the 1992 Act provides for entitlement to IS if the claimant falls within a prescribed category of person. By regulation 4ZA(1) of the IS Regulations, "Subject to paragraphs (2) and (3), a person to whom any paragraph of Schedule 1B applies falls within a prescribed category of person for the purposes of section 123(1)(e) of the Contributions and Benefits Act (entitlement to income support)".

12. In Schedule 1B, at the relevant period a prescribed category of person included "a person who is a lone parent and responsible for– (a) a single child aged under X, or (b) more than one child where the youngest is aged under X, who is a member of that person's household". There was a policy change underway that reduced the age qualification at X from 16 to 5 in four stages between November 2008 and May 2012, but that change does not affect entitlement in this case.

13. By regulation 2 of the IS Regulations, a lone parent is defined as "a person who has no partner and who is responsible for, and a member of the same household as, a child or young person". For present purposes "partner" means where a claimant is a member of a couple, the other member of that couple. Under the relevant definition in regulation 2 of the IS Regulations and in s.133 of the 1992 Act, a "couple" means "a man and woman who are married to each other and are members of the same household".

14. 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.
>
> …

15. The requirement to disclose material facts is expanded in 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.
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> (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).

**Hearing**

16. I held an oral hearing of the application. Mr Allamby of Law Centre NI appeared for the applicant. Ms O'Connor of DMS appeared for the Department. I am grateful for their assistance in this case.

17. 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 applicant 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 applicant was overpaid benefit because she claimed IS as a single parent during a period when she was living in the same household as A.

18. Mr Allamby submitted that the case entirely turned on the question of whether the applicant was a member or the same household as A in the relevant period. If it was established that he was not a member of her household, no question of misrepresentation or failure to disclose could arise. His grounds took issue with a number of aspects of the tribunal's findings of fact on the evidence before it, and challenged the admissibility of statements of interview that were before the tribunal.

19. In the present case, it was not disputed that the applicant and A remained married throughout. Mr Allamby outlined the six signposts commonly considered in cases determining whether a couple are living together as husband and wife, following R(SB)17/81 and *Crake v Supplementary Benefit Commission* [1982] 1 All ER 498, namely:

    (a) membership of the same household;
    (b) stability of the relationship;
    (c) financial support;

(d) sexual relationship;
(e) children; and
(f) public acknowledgement.

19. In written submissions, Ms O'Connor for the Department fairly pointed out that this guidance was addressed to unmarried couples, whereas the applicant and A remain married. The key issue is whether the applicant and A fall within the definition of a couple in regulation 2 of the IS Regulations. This definition encompasses a married couple who are members of the same household.

20. Mr Allamby candidly accepted that there was evidence before the tribunal that pointed towards A being a member of the same household as the applicant. This included his use of the applicant's home address to register cars and for correspondence from the UK Borders Agency, the birth of three children during the period and the lack of any acknowledgement of the relationship ending on the applicant's Facebook account. On the other hand, he referred to evidence of A's transient circumstances, the securing of separate accommodation by A following the grant of refugee status, the claiming of IS from that address, and registration with a doctor, opening a bank account and correspondence with HMRC from that address.

21. The tribunal had accepted that from 16 April 2007 to 22 September 2008 the applicant and A were not members of same household, allowing the appeal in part. It had found that there was a recoverable overpayment of £19,265.50 for the period from 23 September 2008 to 11 April 2014. The sole matter in dispute was whether the applicant and A were members of same household. In making the applicant's case, Mr Allamby relied on jurisprudence arising under Tax Credits (TC) legislation, while properly acknowledging that there were differences in the respective legal tests for IS and TC entitlement.

22. He submitted that there was inconsistencies in the tribunal's approach to the evidence, noting that it found support from the money laundering provisions applied by banks to hold that A could not have obtained an account at the applicant's address without living there, yet observed that he had obtained a bank account from his own address at a period when the tribunal found he was living with the applicant.

23. Mr Allamby submitted that the tribunal had made adverse inferences and applied cultural assumptions against the applicant without any basis – referring to the tribunal's labelling of the applicant and A as "not neophytes". He pointed to findings by the tribunal, such as where it stated that, "I am satisfied that the applicant was complicit in the activities of her husband in manufacturing alternative addresses". He submitted that it was known by the applicant that A was registering cars at her address. He submitted that use of the term "complicit" further indicated the assumption of baseless inferences against the applicant.

24. He further submitted that the tribunal had not addressed the explanations advanced about the Sudanese cultural taboos against divorce. It had found that the applicant and A had fully adopted to their new country but had no basis for reaching this conclusion. Mr Allamby submitted that because of cultural issues the relationship between the applicant and A was unlikely to be straightforward and linear. He relied on the reference made to the Equal Treatment Bench Book (revised 2019) by Upper Tribunal Judge Wikeley in *UA v HMRC* [2019] UKUT 113 at paragraph 45. He submitted that a similar situation applied in the present case.

25. Mr Allamby submitted that the tribunal did not weigh up the explanations given by the applicant for certain issues. He relied on paragraph 23 of *EM v HMRC* [2018] UKUT 220 to submit that it was incumbent on the tribunal to address these adequately. On the continuing involvement of A in family life he submitted that the tribunal had not addressed explanations regarding the applicant's health, including having been a hospital inpatient when A looked after the couple's children. He also submitted that it had not addressed the explanation that the applicant had obtained a DLA Motability car when she didn't drive but that she permitted A to use it on condition that he drove the children to school and took her shopping. He submitted, replying on paragraphs 12-14 of *SA v HMRC* [2017] UKUT 90, that it was wrong to assess evidence on the basis that continuing involvement is necessarily an indication that separation is not likely to be permanent, and that continued involvement may be inherent in the situation.

26. Mr Allamby submitted that the tribunal had required proof of A's transient circumstances during part of the period in issue, whereas it was axiomatic that this was something that could not be established by evidence. He submitted that it was not unusual for an address of convenience to be used when partner was living in transient circumstances after a relationship had broken down. Whereas evidence indicated that A had used three separate addresses – in the form of letters from friends – he argued that the tribunal had wrongly rejected the submission that A lived in transient circumstances on basis of no evidence.

27. While accepting that there were some inconsistencies in the evidence, Mr Allamby generally challenged the quality of tribunal's decision and submitted that it was based upon a series of adverse inferences, combined with a failure to consider cultural issues separately and cumulatively. The tribunal's statement of reasons runs to 10 pages, and while lengthy, Mr Allamby submitted that it was discursive, failed to address issues in contention and lacked in clarity.

28. In response, Ms O'Connor elected not to deal with the specific points raised by Mr Allamby. Rather she took me through the evidence that was before the tribunal relating to A's bank accounts, the registration of cars by A, social work reports, the address on A's driver's licence and the

statements made to the Department, submitting that the overall conclusion of the tribunal was one that it was entitled to reach.

29. When I pressed her on Mr Allamby's grounds, she submitted that the tribunal had not viewed the non-attendance of A as a "big deal" or it would have devoted more time to it. She submitted that the "neophytes" remark was based on evidence, referring to the registration of cars and the applicant's statements to the Department.

30. On cultural issues and the evidence from Facebook, and the question of whether cultural taboos were given enough weight, Ms O'Connor submitted that the tribunal had to take all of the evidence together. She did not accept that the rejection of A's transient status had no basis in evidence.

31. Each of the parties accepted that the statements made by the applicant at interview under caution were not central to decision, although the tribunal did have some regard to them. Mr Allamby pointed out that the interviewing officers had said that the interview was conducted in accordance with the Police and Criminal Evidence (NI) Order 1989 (PACE). However, he submitted, taking me through the relevant legislation, that the Department's officers were not authorised to act under PACE.

32. Mr Allamby submitted that the legislation governing the authorisation and powers of Departmental investigators was contained in sections 103A, 103B, and 103C of the Social Security Administration (NI) Act 1992.

33. Mr Allamby directed me to article 65 of PACE which provides that the Secretary of State shall issue codes of practice in connection with the exercise of police powers. Article 68(8) of PACE provides for persons other than police officers who are charged with the duty of investigating offences shall have regard to any relevant provision of a PACE code of practice. He submitted that by article 66(10) any code of practice shall be admissible evidence and be taken into account if it appears to a tribunal to be relevant. He pointed out that separate legislation, namely the Police and Criminal Evidence (Application to Revenue and Customs) Order (NI) 2007 provided that specific provision of PACE applied to investigations by HMRC. However, he submitted, there was no equivalent legislative arrangement in place for Departmental officers, and therefore no legal basis for the Department finding any power for using the PACE Codes of Practice.

34. I asked, if the Department's practice involved adopting more diligent approach to interviews and voluntarily offering safeguards to interviewees, whether that was anything more than following good practice that is not binding. Mr Allamby submitted that if the practice was represented by the Department as being, but not actually carried out, under PACE, the safeguards were built on sand.

35. The parties noted that under article 66(10), admissibility relates to both courts and tribunals, but accepted that a tribunal faced with a statement that was ruled inadmissible in criminal proceedings would nevertheless have to address the question of what weight could be given to it in tribunal proceedings. The parties accepted that such a statement could not be automatically rejected if properly obtained under PACE. Mr Allamby submitted, however, that by purporting to hold an interview on a statutory basis that did not exist, any statement obtained by the Department should not be admissible unless the statutory lacuna was rectified.

36. On the question of whether admissibility of the statement would materially have affected the outcome of the present appeal, each of the parties accepted that whereas the statement was mentioned and the tribunal clearly had some regard to it, it was not at the core of tribunal's decision.

**Assessment**

37. 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.

38. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

39. 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.

40. I accept that Mr Allamby has established an arguable case of error of law and I grant leave to appeal.

41. The case made by the Department to the tribunal was based substantially on documentary evidence. This tended to show the following facts.

42. The applicant had claimed IS from 16 October 2007 as the single parent of two daughters born on 1 May 1995 and 16 April 2000 respectively.

43. On 21 July 2008, she notified a change of address to her local social security office. A month prior to that, the applicant submitted the birth certificate of a third child, a son born on 10 June 2008, to the same office. The birth certificate identifies the informant for the purposes of the

registration as the child's father, A, whose address was stated as the same address as the applicant.

44. On 26 June 2008, the Department had been given a letter from the Home Office dated 30 May 2008. This letter had been issued to A at the applicant's address, and concerned his entitlement to National Asylum Support Service payments, indicating that an Emergency Support Token would be issued to him at that address by courier within the next two days.

45. The applicant personally attended the local social security office on 28 June 2008. On an A6 form, she reported that A had stayed at her house from 14 to 20 February 2008, then again from 7 April 2008 to the present, and stated that he was staying permanently at the house and that they were now permanently a partnership.

46. However, on 17 July 2008, the applicant attended the local social security office again. She stated that her husband had not come back to live with her but that he only visits from time to time, saying that he does not stay at nights. She explained the change in her account of her circumstances on the basis that her daughter had interpreted for her on the previous occasion but that her daughter's Arabic was not very good. She stated that she did not know her husband's address.

47. The applicant reported a further change of address from 2 April 2009.

48. On 16 April 2010, A made a statement to the local social security office. He stated that he had been granted leave to remain in the UK until 28 December 2012 and submitted a letter that showed that he no longer qualified for NASS support. He stated that had been living at a particular address in Belfast, but that he had been given until the 28th of the same month to find new accommodation. He stated that he was going to live with the applicant the same day. He said that he had been using the applicant's address as a correspondence address for the Home Office as somebody was stealing his post at his own address.

49. The Department received a letter from the UK Border Agency which tended to indicate that A had been paid NASS support at the applicant's first address from 19 March 2008 to 1 June 2008, at the applicant's second address from 30 May 2008 to 10 May 2009 and at the applicant's third address from 8 May 2009 to 6 May 2010. Prior to 19 March 2008, it appeared that A had been paid NASS support to an address in Birmingham, England.

50. On 20 April 2010 the applicant made a further statement on an A6 form to the local social security office. She stated that A did not live at her address and stated that he lived at the address that A had referred to in his statement of 16 April 2010.

51. On 21 April 2010 she made a further statement that A did not live at her address, that she was unsure where he was living now – just that he is with a friend – and that social services had banned him from coming to her house, except twice a week to see the children.

52. On 14 June 2010 the applicant asked for her son, born on 30 May 2010, to be added to her IS claim. A copy of the son's birth certificate named A as his father, who was also the informant for the purposes of registering the birth. His address was stated as that of the applicant.

53. On 15 June 2010, the applicant made a further statement on form A6 to the local social security office, saying that it was a mistake on the birth certificate that he was registered as living at her address. She gave an address where she said that A was living and stated that she was still a lone parent.

54. On 23 May 2013 the applicant asked for another son, born on 10 May 2013, to be added to her claim. A was named on the birth certificate as the child's father. The applicant was the informant for the purposes of registering the birth.

55. Further evidence obtained from third parties was also relied upon by the Department. The Department produced a credit card application in the name of the applicant dated 19 August 2008 in which she stated that she was earning £12,000 per year in a named business.

56. It obtained evidence from the Driver and Vehicle Agency that A gave his address as that of the applicant when he applied for and was issued a provisional driving licence on 27 February 2012. It also indicated that five cars were registered to A between 21 July 2008 and 23 April 2013, the first of which was registered to the applicant's second address and the other four to her third address.

57. It obtained bank statements from Nationwide dated 17 September 2011 and 17 December 2012 showing A's address as that of the applicant's third address at those dates, an application for a Barclays cash card dated 21 December 2012 giving the applicant's third address and stating that he was married with four dependent children, and an application for an new account to Ulster bank dated 21 December 2012, describing himself as single with no dependants, but giving the applicant's third address as his own.

58. It further obtained a copy of an application for a Barclays cash card by the applicant, stating that she had no dependent children but lived with a partner.

59. The Department further placed content from A's Facebook account before the tribunal, in which he described himself as married, and from

the applicant's Facebook account in which she described herself as married.

60. The applicant was interviewed by staff of the Department on 13 May 2015 in the presence of a solicitor and an interpreter. A caution was administered and the interview was said to the applicant to have been conducted in accordance with the Codes of Practice of the Police and Criminal Evidence (NI) Order 1989. A copy of the Codes of Practice 2007 Edition was made available for consultation and it was communicated that amendments had been made in 2012 to Codes C, E, F and H.

61. At interview the applicant denied that A lived with her, saying that he was a very difficult man to have around. She said that it was impossible that she would have said on the Barclays application that she had a partner. She denied ever working in the business named on her credit card application. She said that she had filled in an application to work there once when she was not pregnant. She was asked about an observation of a car registered to A being parked in the driveway of her home on 8 October 2013 at 6am. She explained that she could not remember this, but said that A would sometimes leave his car parked outside her home.

62. The tribunal also had material submitted by the Law Centre on behalf of the applicant. This included a submission of fact, detailing the circumstances of the applicant and A, together with documents tending to show that A lived in different addresses to the applicant.

63. The submission indicated that A was the son of an opposition politician in Sudan who had been killed in 2001, and that A had been imprisoned. It stated that the applicant, who was married to A and had two children with him, had fled Sudan in April 2006, arriving in Belfast in May 2006 where she claimed asylum. She was granted refugee status in October 2007. It stated that A had been released from prison and independently had fled Sudan, arriving in Birmingham, England, in July 2006. He was granted refugee status in April 2010. It stated that the couple did not know of each other's whereabouts until early 2007. After they located each other, they visited each other in Belfast or Birmingham on a number of occasions for short periods in 2007. However, it became clear that there were difficulties in the relationship and it was stated that A stayed at separate addresses with Sudanese friends, although he was not a tenant at any of these addresses.

64. It was stated that there was conflict between the applicant and A over the upbringing of their oldest daughter, leading to social services involvement after a confrontation at the daughter's school and an agreement that A would not visit the applicant's home. It was stated that after he was granted refugee status in 2010 A secured a housing association tenancy from May 2010, subsequently moving to Housing Executive accommodation from an unspecified date. It was demonstrated that A

made a jobseeker's allowance claim from the first of these addresses in 2010, claimed housing benefit, obtained a tax code in relation to his employment in 2012-13, registered with a doctor from 2012 and obtained a bank account from 2013. A social work report from 2013 expressed uncertainty about the nature of the relationship between the applicant and A, noting that they had separate addresses but referring to their "separation" in inverted commas.

65. The submission characterised the relationship between the applicant and A as a turbulent one but as one where they have needed to rely on each other because of their individual personal circumstances and parental responsibilities, while at the same time maintaining separate addresses and households.

66. The LQM directed a submission on the time frames when the applicant and A may or may not have lived together. The submission addressed three periods – firstly when A was resident in Birmingham from 16 April 2007 to 7 April 2008, secondly when he moved to Belfast and lived in transient circumstances from May 2008 to 4 May 2010, and thirdly from when he was granted refugee status from 5 May 2010 to 11 April 2014. The tribunal accepted that the applicant was entitled to IS during the first period, but found that she was not so entitled during the second and third periods and that the IS overpaid was recoverable from her, currently assessed as amounting to £19,265.50.

67. The applicant's challenge to the tribunal's decision principally criticised the manner in which it addressed the evidence and reached its findings. Mr Allamby submitted that the tribunal did not assess evidence in a systematic way, finding which aspects pointed one way or another, offer analysis and make findings on the balance of probabilities. He submitted that the reasons were lengthy but discursive and difficult to follow, that the decision meandered and lacked structure and that it failed to look at both sides of the argument and deal with them.

68. I have sympathy with the tribunal as the facts in the case were complex and a substantial amount of documentary evidence was relied upon, making it difficult to neatly summarise findings and reasons. I cannot find that the tribunal has erred in law on the basis of prolixity alone, but will proceed to address the various matters relied upon by the applicant.

69. Firstly, Mr Allamby pointed out that some findings of the tribunal were inconsistently reasoned. For example, he submitted, the tribunal relied upon the strict application of money laundering regulations by the banks to find that the applicant could not have obtained a bank account from the applicant's address in 2012 without living there, yet found that he was living with the applicant in 2013 when he had obtained a bank account from a different address in that year. It seems to me that there is some merit in that submission.

70. Secondly, Mr Allamby submits that the tribunal made adverse inferences and that assumptions were applied against applicant without any basis. For example, the tribunal refers to being satisfied that the applicant and A were "not neophytes" to benefits system claims – implying that they knew how to abuse the system - but this finding could only be based on the fact that they had claimed benefits along with all other claimants. He submitted that there was no specific basis for the implied finding that they sought to abuse the system.

71. Again, I accept that Mr Allamby makes a valid point. A finding that a claimant is someone who abuses the system may be implied by their actions, but a tribunal must base such a finding on actions. In this specific instance, by labelling the applicant and A as "not neophytes", it appears to a person reading its reasons that the tribunal has based its findings on its judgment of the applicant rather than base that judgment on its findings.

72. Thirdly, Mr Allamby refers to the cultural context. He accept that there was no appearance from the Facebook pages of the applicant or A that they were anything but a married couple. However, he submits that the content was directed towards family in Sudan. I accept that there is force in his reliance on the reference made to the Equal Treatment Bench Book (revised 2019) by Upper Tribunal Judge Wikeley in *UA v HMRC* [2019] UKUT 113 at paragraph 45 that the acceptability of divorce will vary in different cultures. In this case, the tribunal found that in Sudanese culture separation was as likely to be culturally unacceptable as divorce. However, it appears to me that this reasoning on the part of the tribunal does not address the applicant's explanation of why her Facebook presentation was at it appeared.

73. Mr Allamby more generally submitted that no regard was given to the circumstances in which the applicant and A separately were granted refugee status, and the applicant's health and practical dependency on A is an unfamiliar cultural, economic and social environment, referring to *EM v HMRC* [2018] UKUT 200 at paragraphs 23 and 41 to submit that it was necessary for the tribunal to address the applicant's contentions of how the relationship had changed over time and to have regard to the parties intentions when evaluating the factual matrix.

74. Mr Allamby further submitted that the tribunal erred in law by drawing an inference from the non-attendance of A at the tribunal hearing. The tribunal in fact said, "The Appellant's husband did not come today to give evidence. His absence could be construed as significant. He may not have wanted to expose himself to cross-examination form Mr Chapman or the Panel". While language is not entirely clear, contrary to Ms O'Connor's submission, it does support Mr Allamby's contention that an inference was drawn from the non-attendance of A.

75. Mr Allamby has pointed to another aspect of the decision of Upper Tribunal Judge Wikeley in *UA v HMRC*, at paragraphs 11-20. In that case the First-tier Tribunal sought to direct the appellant's husband to attend but he did not come to the hearing, despite the tribunal's having issued directions. Judge Wikeley found that the tribunal had erred in law by drawing an adverse inference from the failure of the appellant's husband to attend. While certain aspects of the relevant tribunal regulations are different in Northern Ireland, the principle is the same. It was clearly not the applicant's responsibility to ensure the attendance of A, and she had no control over that eventuality. As Mr Allamby submitted, another equally likely explanation for A's lack of cooperation with the tribunal was the applicant's account of the nature of their relationship. I do not consider that an inference could properly be drawn against the applicant in the circumstances, yet it appears that this was done.

76. At the hearing, I used an analogy of the tribunal having built a wall from the elements of evidence before it, which Mr Allamby was seeking to undermine by removing individual bricks. Ms O'Connor has not effectively sought to resist the removal of the individual bricks, but maintains that the wall remains sound overall.

77. In the present case, it was not disputed that the applicant and A remained married throughout. Mr Allamby outlined the six signposts commonly considered in cases determining whether a couple are living together as husband and wife, following R(SB)17/81 and *Crake v Supplementary Benefit Commission* [1982] 1 All ER 498, namely:

    (a) membership of the same household;
    (b) stability of the relationship;
    (c) financial support;
    (d) sexual relationship;
    (e) children; and
    (f) public acknowledgement.

78. In written submissions, Ms O'Connor for the Department fairly pointed out that this guidance was addressed to unmarried couples, whereas the applicant and A remain married. The key issue is whether the applicant and A fall within the definition of a couple in regulation 2 of the IS Regulations. This definition encompasses a married couple who are members of the same household. Great Britain Social Security Commissioner Rice had set out the criteria from the Supplementary Benefits Handbook at paragraph 7 of R(SB)17/81, which reads:

> '7. In view of the importance of the criteria to be applied I think it is worthwhile my setting out exactly what the particular handbook referred to does say. The criteria read as follows:-

"(a) Members of the same household. The man must be living in the same household as the woman and will usually have no other home where he normally lives. This implies that the couple live together wholly, apart from absences necessary for the man's employment, visits to relatives etc.

(b) Stability. Living together as husband and wife clearly implies more than an occasional or very brief association. When a couple first live together, it may be clear from the start that the relationship is similar to that of husband and wife, e.g. the woman has taken the man's name and has borne his child, but in cases where the nature of the relationship is doubtful the Commission will be prepared to continue the woman's benefit for a short time in order to avoid discouraging the formation of a stable relationship.

(c) Financial Support. In most husband and wife relationships one would expect to find financial support of one party by the other, or sharing, of household expenses, but the absence of any such arrangement is not conclusive.

(d) Sexual Relationship. A sexual relationship is a normal and important part of a marriage and therefore of living together as husband and wife. But its absence does not necessarily prove that a couple are not living as husband and wife, nor does its presence prove that they are. The Commission's officers are instructed not to question claimants upon the physical aspect of their relationship, though claimants may choose to make statements about it.

(e) Children. When a couple are caring for a child or children of their union, there is a strong presumption that they are living as husband and wife.

(f) Public Acknowledgement. Whether the couple have represented themselves to

> other parties as husband and wife is relevant, but many couples living together do not wish to pretend that they are actually married, and the fact that they retain their identity publicly as unmarried persons does not mean they cannot be regarded as living together as husband and wife".'

79. Mr Allamby did not seek to lead me through each of the criteria, and I consider that Ms O'Connor is correct when she points out that they apply only to unmarried couples. Technically, they cannot be the appropriate criteria to address in determining the only question that arises from regulation 2 of the IS Regulations, namely whether the applicant and A were members of the same household. As that particular issue is addressed at point (a) of the criteria, there would be something oddly recursive in a consideration of that same issue in terms of the remaining criteria from (b) to (f). I consider that the issues from (b) to (f) are only of direct relevance in the present case if they shed particular light on issue (a).

80. I did not explore the issue of the precise legal test before the tribunal fully in oral argument. It appears to me that the tribunal addressed the issue correctly as one of whether the applicant and A were living together. However, a key element of addressing that issue was the tribunal's assessment of credibility.

81. In that context, I consider that Mr Allamby has identified material flaws in the tribunal's approach and reasoning. I believe that he is correct to hold that the tribunal was not entitled to draw an inference from the non-attendance of A at the hearing, but that it did so. His non-attendance is equally attributable to a lack of engagement with the applicant's difficulties as to a fear of being cross-examined and exposed.

82. The tribunal based a finding that A was living at the applicant's address because he gave her address to a bank upon banks strictly applying money laundering regulations. However, it then did not accept that he was living at his own address from May 2010, even though he had a bank account at that address. It appears that Mr Allamby's submission of inconsistency is made out.

83. It was more generally argued that the tribunal did not engage with explanations offered for various apparent inconsistencies, make findings and base its decision on the findings. An example of this might be the cultural sensitivity claimed around divorce, and the resulting influence on the content of social media accounts.

84. While, as has been acknowledged, there is a large amount of evidence that tends to support the case made by the Department, it appears to me

that Mr Allamby has done enough to demonstrate flaws in the tribunal's approach that render its overall conclusions unsafe.

85. I heard argument on the issue of the use of PACE Codes of Practice by officers of the Department conducting interviews under caution. It appears to me that the statement of interview was not material to the outcome of the particular appeal and that anything I might say on this question would be obiter. I consider that it would be more appropriate to wait for this issue to arise in a context where it was decisive to the outcome and to direct full argument from the parties on the issue.

86. In light of the argument I have heard, I consider that I must allow the appeal. I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

(signed): O Stockman

Commissioner

29 June 2020