Appeal Nos. CJSA/2170/2016, CJSA/2171/2016, CJSA/2172/2016, CJSA/2173/2016; CJSA/2174/2016, CJSA/2175/2016, CJSA/2176/2016, pending appeal SC196/15/00608 and uprating of benefit issue.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

DECISIONS

1. **The oral hearing request**

The application for an oral hearing of the appeals is refused.

2. **The uprating issue**

I substitute the decision the F-tT should have made on appeal nos:

CJSA/2170/2016, CJSA/2171/2016, CJSA/2172/2016, CJSA/2173/2016; CJSA/2174/2016, CJSA/2175/2016, and CJSA/2176/2016.

The uprating issue is struck out of each appeal.

3. **SC/196/15/00608**

This matter is returned to the F-tT. It is not a duplicate appeal and must be decided by the F-tT.

Directions: The file must be returned to the F-tT for listing for an oral hearing in relation to the issue of actively seeking employment. The tribunal's decision will attract a fresh right of appeal.

The issue of uprating may be treated as a preliminary issue by a Tribunal Judge who may exercise his power under rule 8(2) of the Tribunal Rules (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ('the First-Tier Tribunal Rules') to strike that issue out, having informed the appellant that it proposes to do so and giving him the opportunity to make representations.

4. **The appeals against CJSA/2170/2016, CJSA/2171/2016, CJSA/2172/2016; CJSA/2173/2016; CJSA/2174/2016; CJSA/2175/2016; CJSA/2176/2016 are dismissed.**

The decisions of the First-tier Tribunal did not involve the making of an error of law.

5. **The bus fare**

The appellant's complaint shall be passed to an administrator for action. Dealing with bus fares is not a judicial function.

REASONS FOR DECISION

The oral hearing request

1. Rules 34(1) and (2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the Upper Tribunal Procedure Rules) provide that the Upper Tribunal may make any decision without a hearing, although it must have regard to any view expressed by a party. If follows that whether an oral hearing is held is a matter for the Upper Tribunal's discretion. In exercising its judicial discretion in making this decision, the Upper Tribunal must also bear in mind the purpose of an oral hearing and the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. The purpose of an oral hearing is to assist the Upper Tribunal with the questions of law to be decided. The appellant has already had an oral hearing by the F-tT. It is clear from the Record of Proceedings and Statement of Reasons that he now raises broadly the same issues though he has continued to elaborate on them in his correspondence. The appellant has explained very fully the errors he believes the F-tT to have made.

3. He also poses many questions. Where his questions can be interpreted as submissions and insofar as they are relevant to his appeals, I will answer them below.

4 Given the extent to which the appellant has made his points in the various cases in which the same points are raised, the Secretary of State's lengthy response and the appellant's observations on them, I consider it unlikely that an oral hearing will add to my understanding of the issues. I have considered the overriding objective of the Upper Tribunal Procedure Rules is so concluding.

> **Overriding objective and parties' obligation to co-operate with the Tribunal**
> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes–
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it–
>
> (a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.
(4) Parties must–
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

5 The issues are clear and the law on these issues is not as complex. The appellant has had an oral hearing by a F-tT and has participated fully through his correspondence. In the circumstances, it would be a disproportionate course of action to list the 8 cases for oral hearing.

6. **The asserted errors of law in relation to the appellant's submissions on his entitlement to JSA and the short answer to each one.**

(a) The F-tT erred in law by treating file no. SC196/15/00608 as a duplicate, thereby depriving him of his appeal in respect of JSA for the period 15 April 2015 – 29 April 2015 **[13].**

Answer: The appellant is correct. This decision was wrongly treated as the duplicate of another appeal. It must go back to the F-tT for a decision: - [12]

(b) The F-tT wrongly refused to address his arguments in respect of the amount of the annual uprating of his JSA. He queried the effect, if any, of section 150 of the Social Security Administration Act 1992.

Answer: The short answer is that the tribunal was correct that the matter was not an appealable decision. It is struck out from each appeal. Any failure to provide further reasons was immaterial [19]

(c) The Jobseeker's Agreement the appellant signed was a legally enforceable contract between a claimant and the Secretary of State, and the Secretary of State was in breach of it.

Answer: It is not a contract that can be enforced in the civil courts; and the tribunals can only deal with appeals permitted by the legislation [25]

(d) The F-tT misunderstood the requirements of actively seeking employment. He asserts that it was not necessary for him to provide information or produce evidence about what he had done to fulfil this requirement.

Answer: The F-tT did not misunderstand the law in any material way. It was up to the appellant to show that he was actively seeking employment by providing information about his jobseeking activities.

(e) The F-tT erred in law by placing a burden of proof on him to show he was actively seeking employment.

Answer: At the end of the day, the appellant failed to provide evidence peculiarly within his own knowledge that was needed to

establish continuing entitlement. Accordingly, if there was any doubt about his entitlement, it was rightly decided against his interest.

(f) He believed he was entitled to reimbursement for a bus fair to the F-tT hearing.

Answer: This is a matter for the administration. Neither the Upper Tribunal nor the FtT has can deal with this.

The Background

7. These are appeals from 7 decisions from the F-tT, as identified by the CJSA numbers allocated by the Upper Tribunal. There is a further issue regarding the fate of an abortive appeal to the First-tier Tribunal registered under SC196/15/00608; and an attempt to appeal the amount of the annual uprating of JSA, which the appellant considers to be inadequate.

8. The 7 CJSA cases relate to the question of whether the appellant was actively seeking employment ('ASE') for the purposes of entitlement to Jobseeker's Allowance ('JSA'). These are undoubtedly appealable decisions.

9. **SC196/15/00608 ('00608')** was an appeal on the same issues during another period. It carried a right of appeal. However, the First-tier Tribunal Judge (F-tTJ) who case managed the various appeals considered that 00608 was a duplicate of appeal **SC196/15/00606** (Upper Tribunal file no. CJSA/2170/2016), perhaps because 00608 and 00606 were decided on the same date, 30 April 2015. This was a wrong conclusion. The Secretary of State's decision in **00608** deals with the period **15 April 2015 – 28 April 2015,** whilst the period in **00606** (CJSA/2170/2016) relates to **1 April 2015 – 14 April 2015**. The next appeal in the sequence, 00742, (CJSA/2071/2016) deals with the period 29 April 2015 – 12 May 2015. The table below sets this out.

10. Matters are not helped in this run of appeals by an incorrect date appearing in the first appeal submission by the Secretary of State. This places the period in question in April 2014. The Secretary of State's decision notice and other evidence are clear that the period in question is 1 April 2015 – 14 April 2015. This date therefore prevails. It is also to be noted that 00743 was allocated a case number that is out of sequence. This is likely to reflect the order in which the cases happened to arrive with HMCTS.

11. The sequence of cases is this:

F-tT Registration No.	**date of decision**	**period in question**	**UT file number**
SC196/15/00606	30/4/15	1/4/15 – 14/4/15	(CJSA/2170/2016)
SC196/15/00608 (voided)	30/4/15	15/4/15 – 28/4/15	[unregistered]
SC196/15/00742	11/6/15	29/4/15 – 12/5/15	(CJSA 2171/2016)
SC196/15/00743	10/6/15	27/5/15 – 9/6/15	(CJSA/2172/2016)
SC/196/15/00744	11/6/15	13/5/15 – 26/5/15	(CJSA/2173/2016
SC196/15/00940	24/6/15	10/6/15 – 23/6/15	(CJSA/2174/2016)
SC196/15/00941	17/7/15	24/6/15 – 7/7/15	(CJSA/2175/2016)

SC196/15/00942 27/7/15 8/7/15 – 21/7/15 (CJSA/2176/2016)

12. The appellant is accordingly correct in his submission that **SC196/15/00608** has not been decided. The Upper Tribunal only has jurisdiction over a matter if the F-tT has made a decision on it: section 11(1) Tribunals, Courts and Enforcement Act 2007. I therefore do not have jurisdiction to deal with it. I cannot strike out the matter formally under rule 8(1)(a) of the Upper Tribunal Procedure Rules as the F-tT has not made a decision. It has not been allocated a registration number at the Upper Tribunal and will simply be returned to the F-tT with the above directions.

The amount of an annual uprating of JSA.

13. The appellant argues that he must be entitled to appeal the amount by which the personal allowance is uprated each year. He argues that he can appeal it because it is a decision by the Secretary of State. He does acknowledge in his letter of 10 May 2016 (p75, CJSA/2170/2016) that the right of appeal given against relevant decisions by section 12 of the Social Security Act 1998 does *no*t extend to matters *falling within Schedule 2 of this Act* (my emphasis).

14. Schedule 2 of the Social Security Act 1998 deals with decisions against which no appeal lies. Paragraph 6 of Schedule 2 says that there is no appeal against: -

> 6 - A decision as to the amount of benefit to which a person is entitled, where it appears to the Secretary of State that the amount is determined by –
>
> (a) the rate of benefit provided for by law; or
> (b) an alternation of the kind referred to in –
>
> (i) section 159(1)(b) of the Administration Act[1] (income support) or
> (ii) section 159A(1)(b) of that Act (jobseeker's allowance)
> (iii) (v) not relevant

Section 159A(1) of the Social Security Administration Act 1992 deals with the effect of alteration of rates of JSA, where –

> an award to a person of JSA is in force in favour of any person ('the recipient'), and an alteration
> (i) in any component of the allowance or
> (ii) in the recipient's benefit income
>
> affects the amount of the JSA allowance to which he is entitled.

14 The appellant argues that paragraph 6 can only exclude his right of appeal where the amount has been decided lawfully. He says that the uprating in question is so small that causes hardship to him. He wishes to know the criteria used by the Secretary of State in making the uprating.

15 I do not accept that his grievance carries a right of appeal under the Social Security Act 1998.

[1] Social Security Administration Act 1992

16 The amount of an uprating is a matter determined by law. Section 4(3) of the Jobseeker's Allowance states that in the case of a person with no income, the amount of income-based JSA for single claimants *shall* [2] be (a) the applicable amount. Section 4(5) says that the applicable amount *shall* be such amount…as may be determined in accordance with regulations. ('Shall' denotes a mandatory requirement in this context.) The relevant regulations are the Jobseeker's Allowance Regulations 1996 which set out the amount of the uprating in Schedule 1, Part 1 – Applicable Amounts.

17 For the periods in question section 1 of the Welfare Benefits Up-rating Act 2013 required the Secretary of State to uprate the personal allowance in JSA by 1%. The only exception [per section 1(5)] was if the annual review under section 150(1) of the Social Security Administration Act 1992 showed that the general level of prices had not increased, or increased by less than, 1%. This exception was not relevant to this appeal.

18 Section 1(6) of the Welfare Benefits Up-rating Act 2013 further provides that *'Where subsection (1) applies…the draft of any up-rating order…by virtue of the review…under section 150(1) of the Administration Act must not include provision increasing any of the relevant sums'.* It would therefore have been impossible for the Secretary of State to have increased the JSA rate by a higher percent via the Welfare Benefits Up-rating Order 2015 (Statutory Instrument 2015/457) which made the up-rating.

19 Finally, it is clear from section 159A(3) of the Social Security Administration Act 1992 that there is deemed to be no further decision in its implementation under the JSA Regulations 1996 and, of course, paragraph 6 of Schedule 2 of the Social Security Act 1998 makes that matter unappealable.

20 Insofar as the appellant wishes to attack the underlying law requiring the uprating to be 1%, he is attacking the validity of the Welfare Benefits Uprating Act and the Welfare Benefits Up-rating Order. He is not attacking a decision under the Social Security Act 1998. If he wishes to pursue this matter, he might wish to take advice on whether it would be appropriate to seek judicial review.

21 The conclusion is that neither a F-tT nor the Upper Tribunal have any jurisdiction to deal with an uprating issue.

22 In my directions of 10 October 2016, I indicated that the F-tT had dealt with the uprating aspect of the appellant's appeals incorrectly. It should not simply have denied jurisdiction. Instead, the F-tT should have indicated that it was minded to strike out that part of the proceedings dealing with uprating, and giving the appellant an opportunity to make representations. I gave the appellant this opportunity, and he exercised it by making the submissions I have already mentioned.

23 The F-tT made an error of law in dealing with the matter in a way that was not permissible. Nevertheless, that error of law was immaterial as the tribunal was bound to reject the matter as out of its jurisdiction had it acted properly.

[2] Emphasis added

24 Section 12(1)(b) of the Tribunals, Courts and Enforcement Act 2007 allows the Upper Tribunal to remake the decision of the F-tT, and I do so by striking out the uprating issue for each of the cases before me. Although I initially considered that I would deal with this issue in only one of the appeals (CJSA/2170/2016), I have decided to strike the issue out of each and every appeal. The matter stands open in the proceedings in 00608 but the appellant should appreciate that this aspect of his appeal is likely to be struck out under rule 8 of the F-tT's equivalent Procedure Rules.

Is a Jobseeker's Agreement a contract?

25 The appellant believes that a jobseeker's agreement is a contract with the Secretary of State of which the latter is in breach. This falls at the first hurdle.

24 A claimant must have signed a jobseeker's agreement as a condition of entitlement to benefit: Jobseeker's Act 1995 section 1(2)(b). It is also a condition of entitlement to Jobseeker's Allowance that a claimant be actively seeking employment (Jobseeker's Act 1995, section 1(2)(c); Jobseeker's Allowance Regulations 1996 ('JSA Regulations 1996), regulations 18 – 22).

25 Section 9 of the Jobseeker's Act 1995 sets out the nature and content of the agreement in further detail. Section 9(1) defines it as an agreement entered into by the claimant and an employment officer which complies with the prescribed requirements at the time when the agreement is made. **Section 9(2)** states –

> *A Jobseeker's Agreement shall have effect only for the purposes of section 1.*

In other words, it only has effect for the purposes of entitlement to Jobseeker's Allowance. It lives and dies under its applicable legislative regime and does not give rise to contractual or other private law rights. So, for example, if a claimant disputes the contents of a jobseeker's agreement, his remedy is tied to the Act: under section 9(6), the employment officer must, if asked, refer the proposed jobseeker's agreement to the Secretary of State for the Secretary of State to determine certain matters.

What constitutes 'actively seeking employment' and who has to prove what? [issues (d) and (e)]

26. The following sections of the Jobseeker's Act 1995 and the JSA Regulations 1996 as relevant to these appeals are.

Section 1 of the Jobseeker's Act 1995:

> (1) An allowance, to be known as a jobseeker's allowance, shall be payable in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of this Act, a claimant is entitled to a jobseeker's allowance if he—
>
> (a) is available for employment;
> (b) has entered into a jobseeker's agreement which remains in force;

(c) is actively seeking employment;
[(d) – (i) not relevant]

(3) A jobseeker's allowance is payable in respect of a week.

(4) In this Act—
…
"an income-based jobseeker's allowance" means a jobseeker's allowance entitlement to which is based on the claimant's satisfying conditions which include those set out in section 3 […]
…

Section 7 of the Jobseeker's Act 1995 - Actively seeking employment.

(1) For the purposes of this Act, a person is actively seeking employment in any week if he takes in that week such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment.

(2) Regulations may make provision—

(a) with respect to steps which it is reasonable, for the purposes of subsection (1), for a person to be expected to have to take in any week;

(b) as to circumstances (for example, his skills, qualifications, abilities and physical or mental limitations) which, in particular, are to be taken into account in determining whether, in relation to any steps taken by a person, the requirements of subsection (1) are satisfied in any week.

(3) - (7) [not relevant]

(8) For the purposes of this section—

"employment" means employed earner's employment or, in prescribed circumstances—
(a) self-employed earner's employment; or
(b) employed earner's employment and self-employed earner's employment;

and "employed earner's employment" and "self-employed earner's employment" have the same meaning as in the Benefits Act.

Regulation 18 of the JSA Regulations 1996

(1) For the purposes of section 7(1) (actively seeking employment) a person shall be expected to have to take more than two steps in any week unless taking one or two steps is all that is reasonable for that person to do in that week.

(2) Steps which it is reasonable for a person to be expected to have to take in any week include–

(a) oral or written applications (or both) for employment made to persons–

(i) who have advertised the availability of employment; or
(ii) who appear to be in a position to offer employment;

(b) seeking information on the availability of employment from–

(i) advertisements;
(ii) persons who have placed advertisements which indicate the availability employment;
(iii) employment agencies and employment businesses;
(iv) employers;

(c) registration with an employment agency or employment business;
(d) appointment of a third party to assist the person in question in finding employment;
(e) seeking specialist advice, following referral by an employment officer, on how to improve the prospects of securing employment having regard to that person's needs and in particular in relation to any mental or physical limitations of that person;
(f) drawing up a curriculum vitae;
(g) seeking a reference or testimonial from a previous employer;
(h) drawing up a list of employers who may be able to offer employment to him with a view to seeking information from them on the availability of employment;
(i) seeking information about employers who may be able to offer employment to him;
(j) seeking information on an occupation with a view to securing employment in that occupation.

(3) In determining whether, in relation to any steps taken by a person the requirements of section 7(1) are satisfied in any week, regard shall be had to all the circumstances of the case, including–

(a) his skills, qualifications and abilities;
(b) his physical or mental limitations;
(c) the time which has elapsed since he was last in employment and his work experience;
(d) the steps which he has taken in previous weeks and the effectiveness of those steps in improving his prospects of securing employment;
(e) the availability and location of vacancies in employment;
(f) – (j) [Not relevant]

(4) Any act of a person which would otherwise be relevant for purposes of section 7 shall be disregarded in the following circumstances–

(a) where in taking the act, he acted in a violent or abusive manner,
(b) where the act comprised the completion of an application for employment and he spoiled the application,
(c) where by his behaviour or appearance he otherwise undermined his prospects of securing the employment in question,

unless those circumstances were due to reasons beyond his control.

(5) In this regulation–
"employment agency" and "employment business" mean an employment agency or (as the case may be) employment business within the meaning of the Employment Agencies Act 1973;

Regulation 24 - Provision of information and evidence

24 (1) A claimant shall provide such information as to his circumstances, his availability for employment and the extent to which he is actively seeking employment as may be required by the Secretary of State in order to determine the entitlement of the claimant to a jobseeker's allowance, whether that allowance is payable to him and, if so, in what amount.

(1A) [not relevant]

(2) A claimant shall furnish such other information in connection with the claim, or any question arising out of it, as may be required by the Secretary of State.

(3) - (3A) not relevant

(4) A claimant shall furnish such certificates, documents and other evidence as may be required by the Secretary of State for the determination of the claim.

(5) A claimant shall furnish such certificates, documents and other evidence affecting his continuing entitlement to a jobseeker's allowance, whether that allowance is payable to him and, if so, in what amount as the Secretary of State may require.

(5A) not relevant…

(6) A claimant shall, if the Secretary of State requires him to do so, provide a signed declaration to the effect that–

(a) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph he has either been available for employment or satisfied the circumstances to be treated as available for employment, save as he has otherwise notified the Secretary of State;

(b) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph he has either been actively seeking employment to the extent necessary to give him his best prospects of securing employment or he has satisfied the circumstances to be treated as actively seeking employment, save as he has otherwise notified the Secretary of State, and

(d) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph there has been no change to his circumstances which might affect his entitlement to a jobseeker's allowance or the amount of such an allowance, save as he has notified the Secretary of State.

(7) A claimant shall notify the Secretary of State–

(a) of any change of circumstances which has occurred which he might reasonably be expected to know might affect his entitlement to a jobseeker's allowance or, in the case of a joint-claim couple, … or the payability or amount of such an allowance; and

(b) of any such change of circumstances which he is aware is likely so to occur,

and shall do so as soon as reasonably practicable after its occurrence or, as the case may be, after he becomes so aware, by giving notice of the change to an

office of the Department for Work and Pensions specified by the Secretary of State–

(i) in writing or by telephone (unless the Secretary of State 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 he requires written notice (unless he determines in any particular case to accept notice given otherwise than in writing)

(8) Where, pursuant to paragraph (1), (1A) or (2), a claimant is required to provide information he shall do so at the time he is required to participate in an interview in accordance with a notification under regulation 23 or 23A, if so required by the Secretary of State, or within such period as the Secretary of State may require.

(9) – (10) [not relevant]

Actively Seeking Work

27 Section 1 of the Jobseeker's Act 1995 contains the bare bones of the conditions of entitlement. 'Actively seeking employment' is fleshed out in section 7 and regulation 18.

28 Section 7(1) states that a claimant is actively seeking employment 'if he takes …such steps as *he can reasonably be expected* to have to take'. It says nothing about giving information about the steps taken.

29 The requirement of reasonableness in section 7 imports an important objective element into the assessment. This is reinforced by the language in regulation 18(1) which refers to *'a* person' having to take more than two steps. There is, however, an individualising process in the 'unless' clause of regulation 18(1), as will be seen in [31].

30 Regulation 18(2) sets out a very wide range of steps *'a* person' may reasonably be expected to take. These are steps that Parliament considers, in general, to be objectively reasonable for a person seeking work to take. The list is inclusive rather than prescriptive. It may be possible, although perhaps unlikely, that a person could take completely different steps and fulfil the condition of actively seeking employment.

31 The individualising of the steps a particular claimant may be expected to take is catered for by the 'unless' clause in regulation 18(1): 'unless taking one or two steps is all that is reasonable for *that* person' to take.

32 Regulation 18(3) lists a number of obvious factors that may affect the steps an individual is reasonably to be expected to take, including the claimant's skills, qualifications, physical or mental limitations, his work experience and the availability and location of vacancies in employment. Importantly, the list also includes the time which has elapsed since the claimant was last in employment, the steps which he has taken in previous weeks and the effectiveness of those steps in improving his prospects of securing employment. As the length of time during which a person has remained unemployed increases, it may be reasonable to expect him to become increasingly proactive in his jobseeking tactics.

How is 'actively seeking employment' to be established

33 The appellant's argument is that, on a proper reading of the provisions, although he has to be actively seeking employment, there is no obligation upon him to prove it other than by signing a declaration every fortnight that he has been available for work, is actively seeking employment and there have been no relevant changes of circumstances (regulation 24(6).

34 Whether this is correct depends on the obligations imposed upon a claimant under regulation 24 of the JSA Regulations 1996. Regulations 24(1)(2)(4) and (5) impose duties on a claimant to furnish information, documents and evidence (which I shall refer to collectively as 'evidence') when the Secretary of State requires him to do so; in other words, where the Secretary of State has made it known to the claimant that he must furnish certain evidence. So, the Secretary of State's reliance on regulation 24(5) and (6)(b) in his submission to the F-tT in this set of appeals does not take him very far unless he shows that he made a request.

35 It is true that the provisions cited above do not state explicitly that a claimant must 'prove' that he is actively seeking employment or that he must (without being asked) provide evidence to demonstrate that he is actively seeking employment, but the Secretary of State is entitled to require the production of evidence in a wide variety of circumstances. As relevant to this appellant, they include:

(a) furnishing information regarding his circumstances, including availability for employment and extent to which he is actively seeking it: regulation 24(1)

(b) furnishing other information in connection with the claim, or any question arising out it: regulation 24(2)

(c) furnishing certificates, documents and other evidence as may be required for the determination of the claim: regulation 24(4)

(d) furnishing certificates, documents and other evidence affecting his continuing entitlement to JSA, whether that allowance is payable to him and if so, in what amount, as may be required require: regulation 24(5)

(e) providing a signed declaration to the effect that the claimant has, since last providing a declaration, (a) been available for employment or …(b) actively seeking employment … (c) and there have been no changes of circumstances which might affect entitlement to JSA or the amount, except as he has notified the Secretary of State. Regulation 24(6)

(f) give notice of any changes of circumstances which the claimant might reasonably be expected to know might affect his entitlement to JSA or changes which he is aware are likely to occur: regulation 24(7)

(g) where information is required under regulation 24(1) … or (2), he is to provide the information at the time he is required to participate in an interview, as notified to him…: regulation 24(8)[3]

36 It is clear from the above list that the standard 'signed declaration' required under regulation 24(6) (point e) is only one amongst many types of further evidence that the Secretary of State may require. It is also clear that there may be an overlap between the subparagraphs of regulation 24.

37 If the Secretary of State *does* make a request for further evidence in order to determine whether, say, a condition of entitlement is satisfied, it is clear from the wording that the claimant is under a duty to supply it. The regulations do not, however, say what is to happen if the claimant fails to supply the required information in breach of that duty. No penalty is specified, but the obvious problem is that a doubt may arise about whether the claimant satisfied, or continues to satisfy a condition of entitlement to benefit. The consequence of that doubt may result in a decision not to award benefit or to terminate an award and decisions involving overpayments.

38 This is where it becomes important to decide who is to bear the consequences of a failure to provide evidence on an issue which leads to such doubts. Lawyers immediately begin to talk about a burden of proof in such a situation. But in cases involving entitlement to benefit from public funds, it is now clear law that a formal burden of proof is a matter of last resort.

39 In *Kerr v Department for Social Development* [2004] UKHL 23, a Northern Irish case, the House of Lords restated the longstanding principle that the process of establishing entitlement to benefit from public funds is an inquisitorial, fact finding exercise requiring cooperation from the claimant and the relevant Department. There should rarely be a need to resort to a formal burden of proof. Baroness Hale of Richmond, who gave the leading opinion in *Kerr* described it at [61] – [63]:

> 61. Ever since the decision of the Divisional Court in *R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble* [1958] 2 QB 228, it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim at p 240:
>
> "A claim by an insured person to benefit under the Act is not truly analogous to a *lis inter partes*. A claim to benefit is a claim to receive money out of the insurance funds. . . Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation, the minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action."

[3] There are further subparagraphs setting out time scales for the provision of certificates, documents or other evidence.

> 62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

> 63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998, "a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself.

40 In his concurring opinion, Lord Hope of Craighead provided a helpful summary of the principles on which this cooperative process worked and the consequences in law of a failure to provide evidence, or a simple lack of evidence, at the end of the day ([15] – [16]).

> 15. In this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and the department must contribute. The claimant must answer such questions as the department may choose to put to him honestly and to the best of his ability. The department must then make such inquiries as it can to supplement the information which the claimant has given to it. The matter is then in the hands of the adjudicator. All being well, the issue of entitlement will be resolved without difficulty.
>
> 16. But there some basic principles which made be used to guide the decision where the information falls short of what is needed for a clear decision to be made one way or the other:
>
> i. Facts which may reasonably be supposed to be within the claimant's own knowledge are for the claimant to supply at each stage in the inquiry.
>
> ii. But the claimant must be given a reasonable opportunity to supply them. Knowledge as to the information that is needed to deal with his claim lies with the department, not with him.
>
> iii. So it is for the department to ask the relevant questions. The claimant is not to be faulted if the relevant questions to show whether or not the claim is excluded by the Regulations were not asked.
>
> iv. The general rule is that it is for the party who alleges an affirmative to make good his allegation. It is also a general rule that he who desires to take

> advantage of an exception must bring himself within the provisions of the exception. As Lord Wilberforce observed, exceptions are to be set up by those who rely on them: *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, 130.
>
> 17. If therefore the claimant and the department have both done all that could reasonably have been expected of them, the issue of fact must be decided according to whether it was for the claimant to assert it or for the department to bring the case within an exception…

41 *Kerr* has been accepted as applicable to decision making in benefit law in the UK generally. Its focus on a cooperative process is consonant with rule 2(3) of the Tribunal Procedure Rules for Tribunals which requires parties to cooperate with the tribunal generally.

42 The Secretary of State did not cite *Kerr* in his authorities but instead mentions the Northern Irish cases C1/00-01 (JSA) and C2/00-01 in which Commissioner Brown (as she then was) assumed that the burden of proof lay on the claimant. Her decisions pre-dated *Kerr* and the use of the burden of proof should now be seen in the light of *Kerr.* The other important aspect of her decision in C2/00-01 - that a tribunal cannot reject a claimant's evidence simply because it is uncorroborated - has never been doubted.

43 In *PC v Secretary of State for Work and Pensions* (JSA) [2016] UKUT 277 (AAC), Upper Tribunal Judge Wikeley accepted Commissioner Brown's decision in C2/100-01. He stated at [17] – [19] that

> 17. The case law supports two clear propositions in relation to this legislation.[4]
>
> 18. The first [proposition] is that it is for the claimant to show that he is actively seeking employment, but that a tribunal cannot reject his evidence simply because it is uncorroborated.
>
> 19. The second is that the focus of the inquiry must be on what the claimant actually did by way of job search, and its reasonableness in all the circumstances, and not on what he did not do – so whether or not each of the particular steps set out in the jobseeker's agreement was carried out is not determinative (unreported decisions CJSA/1814/2006 and CJSA/3416/2009).'

Notably, Judge Wikeley uses the word 'show' rather than 'prove', probably with *Kerr v Department for Social Development* [2004] UKHL 23 in mind, though it was unnecessary for him to refer to that decision in the appeal before him.

44 Putting all the extracts together, the basic principles are these:

(i) Unless the legislation expressly places a burden on one party or the other, the process of deciding an issue in social security cases is an inquisitorial, fact finding exercise in which both parties must cooperate. They must do their best - the Department must ask the right questions and the claimant must answer those questions honestly and to the best of his ability.

[4] Section 7 and regulation 18

(ii) If the evidence before the decision maker or tribunal does not establish an issue one way or the other, the decision maker or tribunal needs to ask which party knows the information, possesses the documents or can best access them.

(iii) So, where the information required falls peculiarly within the claimant's sphere of knowledge, he is the one who usually can and must supply it.

(iv) If a person makes a claim or asserts continuing entitlement to benefit, the general principle 'he who asserts must make good his assertion'.

(v) The same applies if he asserts that he falls within an exception.

(vi) The Jobseeker's Act 1995 and the JSA Regulations 1996 require the claimant to be ready to show he is actively seeking employment. This information is peculiarly within the claimant's sphere of knowledge. It is up to him to show what steps he took to actively seek work when called upon to do when he signs on fortnightly or is asked to do so.

(vii) The corollary holds true where the Department wishes to show that a claimant no longer satisfies the conditions of entitlement for benefit and accordingly seeks to supersede an award.

(viii) At the end of the day, if the information falls short of providing a clear answer one way or the other because one party has not done all they reasonably could to discover it, the issue should be decided against the interest of the party which has not done its job.

(ix) If neither party is at fault in gathering their evidence but there is still a significant gap in the evidence, the party that has not managed to make good its assertion will lose on that issue.

45 In these appeals, the problem for the F-tT was that the appellant declined to provide evidence on the steps he had taken to seek employment in the relevant jobseeking periods. This evidence was peculiarly within the appellant's sphere of knowledge. Only he knew the steps he had taken. There can no doubt in these circumstances that it was up to the appellant to provide it. The F-tT then had to decide, having regard to all of the evidence, whether the steps taken were sufficient to find that he was actively to seeking employment in the periods in question.

46 The appellant declined to cooperate with this process because he did not believe he had to do more than sign a declaration. He was wrong. Relying on *Kerr,* it is plain that information about the steps he had taken actively to seek employment were within his own knowledge, and he was required to cooperate with the tribunal by bringing forward that evidence. He was accordingly the party who had to bear the consequence of the failure to provide the evidence showing that that condition of entitlement was satisfied.

47 At the end of the day, the F-tT was entitled to find against the appellant on the principles established in *Kerr,* and did so.

48 It is equally possible to reach the same result by reference to the appellant's Claimant Commitment. The relevant pages are 11 and 13 of *CJSA/2170/2016.*

49 The Claimant Commitment requires the claimant to '*keep evidence of what I have done and take this with me every time I go to the Jobcentre ... If I cannot show I have done everything that I reasonably can each week to give myself best prospects of securing employment, I know my Jobseeker's Allowance and/or National Insurance Credits…will be stopped* On the signature page of the Claimant Commitment, under the heading 'My Claimant Statement' (p13) the claimant declares that he has read and understood the Claimant Commitment, which 'is my jobseeker's agreement for the purpose of section 1(2)(b) of the Jobseeker's Act 1995.

50 The Claimant Commitment amounts to a requirement by the Secretary of State for the purposes of regulation 24(1) for the claimant to provide evidence of his jobseeking activities during the jobseeking period. The Secretary of State made this requirement known in advance by including it in the Claimant Commitment. The evidence (information) asked for is obviously of the sort that may be needed to determine continuing entitlement to benefit. Whether an employment officer considered it necessary to demand sight of it is a different issue. There may be cases in which it is examined and others in which it is not considered necessary to do so.

51 It would also be idle to argue that, whilst the claimant had to bring the evidence with him, he did not have any obligation to show it to the relevant employment officer if asked. That would be absurd. The Claimant Commitment is meant to be a simple document telling claimants what they have to do to continue to receive benefit. It should not be minced or parsed in a pettifogging way.

52 It follows that the appellant had not produced evidence to show that he had been actively seeking work and the F-tT was entitled to conclude, given that he had not done so, that he did not fulfil this condition of entitlement.

The bus fare

53 The payment of bus fares is not a judicial function.

[Signed on original] **S M Lane**
Judge of the Upper Tribunal

[Date] **28 June 2017**