

IN THE UPPER TRIBUNAL

Appeal No: CH/1766/2019

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the claimant.

The decision of the First-tier Tribunal sitting at Liverpool on 7 January 2019 under reference SCo68/18/02969 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to allow the claimant's appeal from Liverpool City Council's decision of 28 April 2017 and hold that she was entitled to housing benefit from and including 3 April 2017.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. I am satisfied in the light of the arguments made on this appeal that the First-tier Tribunal erred in law in its decision of 7 January 2019 ("the tribunal") and that, as a result, its decision should be set aside.
2. Both parties agree that I should redecide the decision under appeal from Liverpool City Council's decision of 28 April 2017 rather than remit the appeal to the First-tier Tribunal to be redecided afresh. I agree to do so and give that decision above and explain the basis of it below.

3. The error of law the tribunal made, in short, was in fundamentally misunderstanding its function in deciding entirely afresh the decision under appeal to it. As has recently been pointed out in *JM v Secretary of State for Work and Pensions* (PIP) [2017] UKUT 419 (AAC), the First-tier Tribunal in deciding an appeal afresh is not exercising a judicial review jurisdiction nor should it limit itself to reviewing whether the process by which the respondent came to its decision was fair, legal and rational: see further *R(H)1/08*.
4. The appeal to the tribunal in this case was from a decision made by Liverpool City Council (“Liverpool”) on 28 April 2017 which had refused the appellant’s claim for housing benefit on the basis that she had capital exceeding the capital limit for housing benefit of £16,000. The capital was said to be the value a property owned by the appellant which she was not occupying.
5. In Liverpool’s written appeal response to the First-tier Tribunal it said that the appellant had “formally appealed against the LA’s decision on 13/02/18”. The grounds of the appeal were summarised in the appeal response as being:

“...that the property she owned was subject of a restraint order prohibiting disposal of assets pursuant to Section 41 of the Proceeds of Crime Act 2002. Evidence of the court order was supplied by [the appellant] on 03/01/18”.

6. The reasons for Liverpool’s decision of 28 April 2017 were described in the appeal response as follows:

“On the HB application form [the appellant] stated that the value of the property she owned did not exceed the capital threshold and that there was a ‘county court order on it’. No evidence of this was provided until 03/01/18, although the court’s restraint order was actually made on 23/03/17.

The negative equity of the property....and the POCA proceedings were also referred to in an e-mail the LA received on 15/08/17.....but no evidence was provided to support these assertions.

A further reference to the POCA proceedings was referred to in an appeal the LA received on 27/12/17.....but once again, and although it

was available and in [the appellant's] possession, no documentary evidence was provided.

It was not until 03/01/18 that [the appellant] supplied a copy of the court order which showed that she was legally prohibited from disposing of [the property] and, for HB purposes, should therefore be treated as not having access to any capital value in the property.

Further evidence was supplied on 22/02/18....which showed that there are mortgage arrears of more than £63,000 in relation to the property, which would considerably reduce the value of any capital deemed to be held by [the appellant].

To summarise, the LA is satisfied that its decision was correctly based on the evidence available to it at the time, and that the late appeal and late application for revision should not be allowed, given that [the appellant] delayed providing key evidence which would likely have resulted in HB being awarded from April 2017.” (my underlining added from emphasis)

7. It is thus apparent that Liverpool's case was that the (late) appeal should not be allowed because the appellant had 'delayed' providing evidence which, even on Liverpool's case, was relevant to her circumstances (and entitlement to housing benefit) in April 2017. For completeness I should add, as I develop below, that there was no issue by this stage that the late appeal had been admitted by the First-tier Tribunal as an appeal.
8. The tribunal refused the appeal and upheld Liverpool's decision. In its decision notice it gave the following reasons for its decision.

“The Tribunal find that [the appellant] was not entitled to Housing Benefit in respect of her claim of 03/04/2017 because she held capital in excess of the prescribed limit of £16000.00. The capital was held in a property owned by the Appellant known as.....[H]owever the Tribunal also find that (as the local authority found) that she was entitled to Housing Benefit from 08/01/2018 having provided evidence of a Court Order dated 23/03/2017 which was supplied....to the Local Authority on 03/01/2018.”

9. It is clear from its later statement of reasons that, like Liverpool, the tribunal founded on the local authority not knowing at the time of its 28 April 2017 decision about the Proceeds of Crime Order until January 2018, and on this basis found that the appellant held capital above

£16,000 from the date of her claim in April 2017 until January 2018.

Thus, it said the following in its reasons:

“13..... The capital was “held” in a property owned at the time by the appellant.....At the time the LA did not know and could not reasonably have known since 23rd March 2017 a Court Order had been issued under the Proceeds of Crime Act prohibiting the appellant from disposing of the asset. The “asset” was also in some considerable arrears in respect of mortgage payments but again the LA did not know this until they received a copy of the Court order in January 2018.....

16. The appellant did not dispute the fact that she had not informed the LA earlier of her circumstances in respect of the POCA action or that she had provided any other relevant evidence or information sooner than 03/01/2018.....

In conclusion, on balance.....the Tribunal found the decision at the time was correct.....The LA made this decision because they did not have any other relevant other information available to them to reach a different conclusion.....

17. On the evidence available it was open to the appellant at all times leading up to the POCA proceedings or since receipt of the Court Order dated 23/03/2017.....or at any subsequent to provide the Order or relevant information pertaining to her debts and/or those proceedings to the Local Authority in support of her claim but she chose not to do that until 03/10/2018....”

10. I regret to have to say that the above reasoning of the tribunal, and Liverpool, demonstrates a fundamental lack of understanding of the law as it applies to appeals to the First-tier Tribunal.
11. The ‘restriction’ to the date of the decision under appeal is found in paragraph 6(9)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 (a piece of the law which regrettably was not set out or referred to either by Liverpool in its appeal response or by the tribunal). Reversing the negatives in paragraph 6(9)(b), it restricts consideration on an appeal to the “circumstances obtaining at the time when the decision appealed against was made”. Importantly, however, this provision does not restrict consideration to the evidence that was before the first instance decision maker (here, Liverpool). Evidence that is subsequently obtained but which is relevant to the circumstances obtaining at the time of the decision under appeal may,

indeed arguably must, be taken into account on an appeal to the First-tier Tribunal.

12. That evidence in this case would cover both the Proceeds of Crime Order and the evidence of the negative equity as each applied as at the date of the claim and/or the date of the decision under appeal. The tribunal's exclusion of that evidence and its limiting itself to reviewing whether Liverpool made the correct decision on the evidence before the local authority in April 2017 were both fundamental errors of law.
13. The above scope of paragraph 6(9)(b) (and its equivalent in section 12(8)(b) of the Social Security Act 1998) was explained in clear terms as far back as in decisions such as *R(DLA) 2/01* and *R(DLA) 3/01*. It would appear from what occurred in this case that those explanations may need to be provided again. All I need to do is quote from the relevant parts of the headnotes to *R(DLA) 2/01* and *R(DLA)3/01*:

R(DLA) 2/01

“(i)...the tribunal's jurisdiction was limited to the inclusive period from the date of the claim to the date of the decision under appeal; (ii) evidence was not admissible if it related to a period later in time than the period within the tribunal's jurisdiction but the tribunal was not limited to evidence that was before the officer who made the decision under appeal or that was in existence at the date of that decision providing the evidence related to the period within the tribunal's jurisdiction.”

RDLA)3/01

“(ii)the tribunal's jurisdiction was limited to the inclusive period from the date of the claim to the date of the decision under appeal; (iii) the tribunal was not able to take into account a fresh circumstance arising after the date of the decision under appeal; (iv) evidence was not admissible if it related to a period later in time than the period within the tribunal's jurisdiction but the tribunal was not limited to evidence that was before the officer who made the decision under appeal or that was in existence at the date of that decision provided the evidence related to the period within the tribunal's jurisdiction.”

14. As I have noted, this was a case in which the appellant made (or at least was treated as making) a late appeal against the decision of 28 April 2017. However, the late appeal was ‘supported’ in being admitted by Liverpool in its AT37 form of 25 May 2018. Given this, and given the

appeal was not made more than 13 months after the decision date, the effect of rule 23(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 was that the appeal was treated as having been made in time (because Liverpool did not object to it being admitted). And it was no doubt for this reason that it was then admitted by the First-tier Tribunal. Having been admitted, however, as I have said above the appeal required the First-tier Tribunal to decide the appellant's entitlement to housing benefit afresh and on the basis of the circumstances that obtained between 3 April 2017 and 28 April 2017: per paragraph 6(9)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. Manifestly, the court order of 23 March 2017 was a circumstance obtaining both at the date of claim and at the date of the decision under appeal of 28 April 2017.

15. Putting this another way, once the appeal was admitted nothing as a matter of law or as a rule of evidence excluded the court order from being relevant evidence before the tribunal in respect of the 24 April 2017 decision. Moreover, as I have said, it was not for the tribunal to review Liverpool's decision and decide whether it had been correctly made by Liverpool on the evidence it had before it in April 2017. Rather it was for tribunal to decide for itself what the appellant's entitlement was to housing benefit in April 2017 on the evidence the tribunal had before it about the circumstances obtaining in April 2017.
16. I should add, though it is now no longer relevant to the outcome of this appeal (and for this reason I have not set out the parts of the proceedings below where this point is discussed), that I cannot see any basis on which the late revision rules had any relevance on the appeal to the tribunal. A decision whether to extend time to admit a late revision request is not appealable: see *R(TC)1/05*. But in any event, a late revision of the 24 April 2017 decision was of no relevance in circumstances where that decision was under appeal to the First-tier Tribunal and that tribunal can give any decision that ought to have

been made by the local authority. Therefore, insofar as it matters, the tribunal further erred fundamentally in law in addressing the revision issue and considering it was relevant to the appeal before it.

17. The parties are agreed that the Upper Tribunal should re-decide the first instance appeal. I consider I am able to do so. The sole basis of Liverpool's decision (and that of the tribunal) was that the appellant had not provided the Proceeds of Crime Order ('POCA') evidence before it made the decision under appeal. That was wrong, for the reasons I have given above. Importantly, however, and entirely in line with the law – see *CS v Chelmsford Borough Council* [2014] UKUT 518 (AAC) – Liverpool have accepted that the POCA has the effect of rendering the property subject to the POCA of nil capital value, though it wrongly only applied that consideration from 3 January 2018. Given the POCA was in place before the claim for housing benefit was made, and given that the sole basis for Liverpool's disentitlement decision was the capital value of the property the subject of the POCA, it follows in my judgment that at the time of her claim for housing benefit on 3 April 2017 and the decision on that claim of 28 April 2017, the claimant had capital to the value of nil and accordingly was entitled to housing benefit from 3 April 2017.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

Dated 13th March 2020