IN THE UPPER TRIBUNAL **Appeal No. UA-2021-000447-HB**
(ADMINISTRATIVE APPEALS CHAMBER) **[2024] UKUT 49 (AAC)**

On Appeal from the First-tier Tribunal (Social Entitlement Chamber) SC168/19/01181

BETWEEN

Appellant DG

(by his appointee JG)

and

Respondent BROMLEY LONDON BOROUGH COUNCIL

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided after a hearing on 22 May 2023: 26 May 2023

Representation:

Mr Jeremy Ogilvie-Harris (paralegal, Hackney Community Law Centre)

Mr Dominic Carr (appeal and tribunal officer, Bromley LBC)

DECISION

The decision of the First-tier Tribunal sitting at Fox Court dated 17 February 2021 under file reference SC168/19/01181 does not involve a material error on a point of law. The appeal against that decision is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal sitting at Fox Court on 17 February 2021.

2. I shall refer to the appellant hereafter as "the claimant". The respondent is Bromley London Borough Council. I shall refer to it hereafter as "the Council". I shall refer to the tribunal which sat on 17 February 2021 as "the Tribunal".

3. The appellant, who is represented by his appointee, who is his mother, appealed against the decision of the Council dated 26 June 2018 that the sum of £11,002.15 housing benefit had been overpaid in relation to a property let to him by Clarion Housing from and including 12 June 2016 (so allowing the full 52-week exemption provided by the Regulations) to and including 28 May 2018. On 5 October 2018 the Council decided to seek repayment from Clarion, but it was accepted at that point that the Council could seek repayment from either the landlord or the tenant and the appeal originally proceeded on that basis. However, the Tribunal found that Clarion did not know that the appellant had moved out of the property until after the Council had been so informed, so that there was no failure to disclose a material fact on the part of the landlord and recovery could not therefore be made against it. Recovery could therefore only be made, if at all, against the appellant. There was no appeal from that aspect of the decision.

4. The matter came before the Tribunal on 17 February 2021 when the appointee appeared by telephone with her representative, Mr Hallstrom of Z2K. A presenting officer, Mr Dominic Carr, its appeals and tribunals officer, appeared for the Council. Clarion did not appear and was not represented, but the Tribunal considered that it was fair to proceed in the landlord's absence. The appeal was refused.

5. The appointee sought permission to appeal, which was refused by the Tribunal Judge on 7 September 2021. She applied to the Upper Tribunal for

permission to appeal and on 11 February 2022 I directed an oral hearing of the application for permission to appeal, which I heard on the afternoon of 29 June 2022. The appointee was on this occasion represented by Mr Jeremy Ogilvie-Harris of Hackney Community Law Centre, who had submitted a skeleton argument in advance of the hearing. I granted permission to appeal and made directions for further submissions. I heard the appeal on the morning of 22 May 2023 when the appellant was again represented by Mr Ogilvie-Harris and the Council was again represented by Mr Dominic Carr, its appeals and tribunals officer.

The Statement Of Reasons

6. In its statement of reasons the Tribunal stated that

> "3. The Tribunal decide that the overpayment was not recoverable from Clarion because it did not know that [the appellant] was no longer residing in the Property. However, it was recoverable from [the appellant] because there was no disclosure in writing that he was not resident in the property; the Council became aware of his absence following an email from a social worker on 22 May 2018.
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> …
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> **Findings of fact**
> 14. [The appellant] suffers hyperphrenic schizophrenia and autistic spectrum disorder, and since 2014, his mother […] had been the DWP appointee for his social security benefits.
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> 15. [The appellant] applied for HB on 24/12/14 and asked that all payments be made to his landlord because he had a mental health condition. HB was paid, and [he] was sent the "Important Notes" at page 129 of the Bundle, which instructs him that he must inform the Council "in writing" if "anyone moves in or out of your home" and if "someone goes into or leaves hospital".
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> 16. On 11/1/15 [the appellant] was detained under s.3 of the Mental Health Act 1983, and admitted to [a hospital]. He was later transferred to [a private clinic], which specialised in complex mental health needs.

17. In mid-2015, his detention was renewed for 6 months and in early 2016 was renewed for a further 12 months. It was common ground that [he] intended to return to the Property after he was discharged from hospital.

18. [His mother] visited him around every two weeks. She also continued to visit the Property. During the period [the appellant] was sectioned, the Council was frequently contacted in relation to problems with the Property (see the long list at p 117). Some of these issues required a contractor appointed by Clarion to attend the Property, but at no point was Clarion told by [the appellant or his mother] that [he] was not residing there, and neither Mr Hallstrom (by way of submissions) nor [his mother] (by way of evidence) sought to argue otherwise. Neither was it reasonable for Clarion to make that inference from any of the contacts they had received in relation to the Property.

19. On 2/6/16 [his mother] attended the Council's offices (p.65) with queries about council tax and benefits. Her evidence was that she told them orally that her son was "in hospital" but she did not say that she told them he had been absent from the Property since January 2015. I find that she informed the Council orally only that [the appellant] was in hospital but not that he had already been absent for 18 months.

20. It was a key part of [his] case that [his mother] had made a separate visit to the Council's offices to tell them her son was in hospital and not resident in the Property (see para 7 of Z2K's submissions). Under cross-examination [she] did not confirm she had made a second visit. On re-examination by Mr Hallstrom, she said she had made such a visit, but could not remember the date; she said that the purpose was to tell the Council that [her son] "was in hospital" and agreed that she did not have an appointment. The Council have no record of any such additional visit and Mr Carr did not accept that it had taken place.

21. Taking into account the vagueness of [her] evidence, the lack of any record by the Council, and the fact that on her own account she had simply repeated the information previously provided – namely that [he] was "in hospital" – I find as a fact that there was no such visit. It was in any event common ground that [his mother] had never provided the Council with written notification of her son's absence.

22. On 22/5/18, a social worker informed the Council that [the appellant] was not resident in the Property (p 87). I find as a fact that this was the first date on which the Council were informed in writing of the situation.

23. On 15/6/18 (p 180) and 26/6/18 (p 182), the Council notified both Clarion and [the appellant] of the overpayment and that it was recoverable from them. The overpayment was calculated to take effect from 11/1/16, so allowing the full 52 weeks under Reg 7(6) as it was accepted that [he] had intended to return to the Property as his home.

24. On 8/10/18 the Council informed Clarion that the overpayment was recoverable from them (p 186).

The law on Housing Benefit

25. The provisions set out below are those relevant to the issues before the Tribunal.

26. Reg 88 of the HB Regs is headed "Duty to notify changes of circumstances" and reads:

> "(1) Subject to [paragraphs (3) and (6)], if at any time between the making of a claim and a decision being made on it, or during the award of housing benefit, there is a change of circumstances which the claimant, or any person by whom or on whose behalf sums payable by way of housing benefit are receivable, might reasonably be expected to know might affect the claimant's right to, the amount of or the receipt of housing benefit, that person shall be under a duty to notify that change of circumstances by giving notice to the designated office
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> (a) in writing; or
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> (b) by telephone--
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> (i) where the relevant authority has published a telephone number for that purpose or for the purposes of regulation 83 (time and manner in which claims are to be made) unless the authority determines that in any particular case or class of case notification may not be given by telephone; or
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> (ii) in any case or class of case where the relevant authority determines that notice may be given by telephone; or

(c) by any other means which the relevant authority agrees to accept in any particular case."

27. Reg 100 of the HB Regs is headed "Recoverable overpayments" and reads [which was then set out in the body of the decision and which I set out in full below] …

28. Reg 10[1] is headed "Persons from whom recovery may be sought", and para 2(1) reads:

> "For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), where recovery of an overpayment is sought by a relevant authority--
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> (a) subject to paragraph (1) and where sub-paragraph (b) or (c) does not apply, the overpayment is recoverable from the claimant as well as the person to whom the payment was made, if different;
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> (b) in a case where an overpayment arose in consequence of a misrepresentation of or a failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant, or by or on behalf of any person to whom the payment was made, the overpayment is only recoverable from any person who misrepresented or failed to disclose that material fact instead of, if different, the person to whom the payment was made; or
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> (c) in a case where an overpayment arose in consequence of an official error where the claimant, or a person acting on the claimant's behalf, or any person to whom the payment was paid, or any person acting on their behalf, could reasonably have been expected, at the time of receipt of the payment or of any notice relating to that payment, to realise that it was an overpayment, the overpayment is only recoverable from any such person instead of, if different, the person to whom the payment was made."

The issues and the Tribunal's decision

29. The issues in dispute were whether Clarion and/or [the appointee] (on behalf of [her son]) had failed to disclose the material fact that he was not living at the

> Property, or whether there had an official error by the Council.
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> 30. I have already found as a fact that Clarion did not know that [he] had moved out until after the Council had been so informed, so there was no failure to disclose. I add that there is no active duty on a landlord to check that a tenant continues to be resident, see *Hastings BC v PA and DA Hanlon* (HB) [2013] UKUT 232 (AAC))
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> 31. [His mother] did not make any disclosure "in writing" of [her son's] change of circumstances, as required by Reg 88(1). Although she told the Council orally that he was "in hospital" when she visited on 2/6/16, she did not say that he had been absent from the Property since 11/1/15. Her oral notification was thus both incomplete, and did not meet the requirements of Reg 88. In coming to that conclusion, I have not overlooked Mr Hallstrom's submission that the Tribunal should follow *R(SB) 15/87*. That case does not concern Housing Benefit and is not a relevant authority.
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> 32. It follows that [his mother] failed to disclose a material fact, and that there was no official error by the Council.
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> 33. [The appellant's] lack of mental capacity is not a relevant factor for the purposes of the HB legislation. As I said at the end of the decision, I have no jurisdiction over whether the Council decides to exercise its discretion to recover the overpayment from [him], given his mental health condition."

The Housing Benefit Regulations 2006

7. As the Tribunal set out in its statement of reasons, so far as is material the Housing Benefit Regulations 2006 provide that:

> "99. In this Part, "overpayment" means any amount which has been paid by way of housing benefit and to which there was no entitlement under these Regulations (whether on the initial decision as subsequently revised or further revised) and includes any amount paid on account under regulation 93 (payment on account of a rent allowance) which is in excess of the entitlement to housing benefit as subsequently decided.

> 100(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.
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> (2) Subject to paragraph (4) this paragraph applies to an overpayment caused by an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.
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> (3) In paragraph (2), "overpayment caused by official error" means an overpayment caused by a mistake made whether in the form of an act or omission by—
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> (a) the relevant authority;
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> (b) an officer or person acting for that authority;
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> (c) an officer of—
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> (i) the Department for Work and Pensions; or
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> (ii) Revenue and Customs,
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> acting as such; or
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> (d) a person providing services to the Department for Work and Pensions or to the Commissioners for Her Majesty's Revenue and Customs,
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> where the claimant, a person acting on his behalf or any other person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission".

8. The general principle, therefore, is that all overpayments are recoverable unless the criteria in regulation 100(2) apply. Those exceptions to the general rule are

> (i) if the overpayment was caused by an official error which the claimant or a person acting on his behalf did not cause or to which he did not materially contribute; and

> (ii) if the claimant or a person acting on his behalf could not reasonably have been expected to realise that there was an overpayment either at the time when it was made or when he received any notice relating to the payment.

The Grounds Of Appeal

9. Mr Ogilvie-Harris accepted that the Tribunal made findings of fact that:

(a) the Council had sent a letter to the appellant indicating that changes of circumstances were to be given in writing: "[the appellant] was sent the "Important Notes" at page 129 of the Bundle, which instructed him that he must inform the Council "in writing" if "anyone moves in or out of your home" and if "someone goes into or leaves hospital" (paragraph 15)

(b) the appointee had notified the Council orally on 2 June 2016 that the appellant "was "in hospital", but she did not say that she told them he had been absent from the property since January 2015. I find that she informed the Council orally only that [the appellant] was in the hospital but not that he had already been absent for 18 months" (paragraph 19).

10. The Tribunal held, accordingly, that:

> "31. [the appointee] did not make any disclosure "in writing" of [the appellant's] change of circumstances as required by reg. 88(1). Although she told the Council orally that he was "in hospital" when she visited on 2/6/16, she did not say that he had been absent from the Property since 11/1/15. Her oral submission was thus both incomplete, and did not meet the requirements of reg. 88."

11. Mr Ogilvie-Harris accepted that the disclosure did not meet the requirements of regulation 88(1), but did not accept that the disclosure was incomplete, submitting that the appointee was not obliged to disclose the duration of her son's stay in hospital. All that she was required to do, as set

out in the notes on page 129, was to inform the Council that he was in hospital.

12. He submitted that there were two issues of law in the appeal:

(a) could the failure of a benefits officer to advise a claimant to notify a benefits authority in writing of a change of circumstances amount to an official error? The appellant contended that the answer to that issue, applying ***West Somerset District Council v JMA (HB)*** [2010] UKUT 190 (AAC) ("***JMA***"), was "yes":

> "26. It is self evident that claimants need help to know what they are to do to comply with the rules as to benefits. That is why they are given instructions as to what they are to do if there is a change of circumstances. In this case the council failed to tell the claimant that her information as to change in circumstances had to be in writing, and *when she went to their offices to give them the information, a council officer failed again to advise her to put it in writing* or, if it was necessary to do so, to provide the same information to the housing benefit section. *That was a mistake by the council acting as such, and it cannot be said that the claimant in any way caused or materially contributed to that mistake*" (emphasis added)

(b) could the failure of a benefits officer to ask relevant questions to a claimant notifying of a change of circumstances amount to an official error? The appellant contended that the answer to that issue, applying ***MB v Christchurch BC (HB)*** [2014] UKUT 201 (AAC) ("***MB***"), was "yes":

> "41. The same point was put, perhaps rather more pithily, by Baroness Hale of Richmond in her opinion: "*the system places the burden upon the department of asking the right questions and upon the claimant of answering them as best he can*" (at paragraph [58]). Thus the benefits adjudication system "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" (at paragraph [62])" (emphasis added).

13. If the answers to those questions were "yes", Mr Ogilvie-Harris submitted that the Tribunal erred in law in that:

(a) it asked whether there was a breach of regulation 88(1) rather than asking the "broad commonsense question as to what was the substantial cause of the overpayment", see ***R (Sier) v Cambridge City Council Housing Benefit Review Board*** [2001] EWCA Civ 1523 ("***Sier***"). He submitted that the failure to record the change of circumstances notified orally to the Council was the cause of (at least part of) the overpayment.

(b) the Tribunal failed to make relevant inquiries into whether the factual circumstances in ***JMA*** were analogous to the current appeal:

(i) it failed to making findings as to whether the appointee, in fact, was aware that a change of circumstances could only be notified in writing

(ii) it failed to make findings as to whether the Council failed to inform the appointee of the duty to notify of a change in circumstances by writing rather than orally and at the benefits office

(c) the Tribunal failed to consider whether, on 2 June 2016, the Council had asked the relevant questions, as required by ***MB***, relating to the appellant's entitlement, i.e. it failed to ask since when the appellant had been in hospital.

The Council's Reply

14. The Council relied on the decision in ***JMA*** as illustrating the point that there was a duty to report changes in the prescribed manner and that the claimant must be put on notice of the requirement to make notification in the prescribed manner.

15. On the facts of this case it was clear from the notes which appeared on the reverse of the Council's decision letters (of which page 129 was but one example) that the duty to make notification of change of circumstances to the Council's benefit office had to be in writing. The Council had not published a telephone number to take claims by telephone nor had it agreed to take notification of changes of circumstances by any other method. In that context the Council relied on the decision of the House of Lords in ***Hinchy v Secretary of State for Work and Pensions*** [2005] UKHL 16.

16. Secondly, the Council submitted that as of 2 June 2016 it had no authority to deal with anyone other than the appellant himself. It was not until 5 July 2016 that it received authorisation from him that his mother had authority to act on his behalf concerning his personal affairs.

17. The Council submitted therefore that it had no duty to act on the alleged oral notification made by his mother on 2 June 2016 as it had not received notification in the prescribed manner under regulation 88 and nor had there been any authorisation for his mother to act on her son's behalf.

18. No notification of his absence from the property was made after 5 July 2016 when he authorised her to act on his behalf, so that was no official error on the part of the Council.

19. Official error would only have occurred if the Council had ignored information provided by the appellant or a person acting on his behalf and the appointee was not authorised as a person to act on her son's behalf until after 2 June 2016. When she was then duly authorised to act on his behalf, she did not make any further disclosure as to his stay in hospital.

The Appellant's Response

20. In response Mr Ogilvie-Harris addressed the two arguments raised by the Council:

(1) that there could not be an official error if notification of a change of circumstances was not made in writing pursuant to regulation 88(1)

(2) that there was no official error on behalf of the Council because the appointee did not provide an authority to act for the appellant until after the oral notification was made on 2 June 2016.

21. Mr Ogilvie-Harris submitted that

(1) the question as to whether there had been an official error was not confined to whether a claimant or person acting on his behalf had complied with regulation 88(1), but was dependent on all the circumstances, including what the principles of good administration would require. In all the circumstances, the Council's officer should have recorded the change of circumstances notified orally or otherwise assisted the appointee to comply with regulation 88(1).

(2) the Council did in fact accept that the appointee had authority to act on her son's behalf; even where a person did not have authority, an omission could still occur if a local authority failed to act on the information provided; in any event, if it was not accepted by the Tribunal that the Council had accepted that the appointee had authority or that the appointee had provided sufficient evidence that she had authority, then further findings of fact would be required.

22. He made two further points not directly addressed by the Council:

(1) if it was accepted that there was an official error by the Council, the appellant and appointee did not contribute to that official error

(2) if it was accepted that there was an official error to which the appellant and appointee did not contribute, it would not be reasonable in the circumstances for either the appellant or appointee to have recognised that there was an overpayment (under regulation 100(2)).

23. As to regulation 88, the underlying premise of the Council's argument was that an official error under regulation 100 could not occur where a claimant had not complied with regulation 88(1). Accordingly, the Council interpreted ***JMA*** as showing "*that there is a duty to report changes in the prescribed manne*r" and that this duty would not be breached if the claimant was not given notice of the duty (at [189]). The Council continued that there was "*no duty to act upon the alleged oral notification made on the 02.06.12 as the LBB had not received the notification in the prescribed manner*". The argument appeared to be that the failure to record the change of circumstances notified orally could not be an omission, i.e. official error, because there was no duty to record information communicated in any way other than in writing.

24. By contrast, the appellant submitted that the definition of a "*mistake made whether in the form of an act or omission*" for the purposes of regulation 100(3) was not referring to the obligation under regulation 88(1) alone, but in all cases was a question of fact and degree.

25. Mr Ogilvie-Harris submitted that ***Hinchy v SSWP*** could be distinguished from the present appeal. ***Hinchy*** dealt with a situation where the claimant was arguing that the Department for Work and Pensions team dealing with her income support award should have known that her disability living allowance award had come to an end:

> *"25. […] Miss Hinchy had failed to make disclosure to her local Social Security office. She had done nothing to communicate the information to the relevant decision maker. He was not deemed to know about the cessation of her DLA merely because it was known to, or a decision by, another office of the department*" (emphasis added).

26. It was in this context that Lord Hoffman held that "*the claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the department"* (paragraph 32). ***Hinchy*** was dealing with a different welfare benefit (income support), a different legal test

(whether *"in all the circumstances disclosure could not reasonably have been expected of her*" at [6]), and with different facts (whereas Miss Hinchy had communicated *nothing* to the DWP, the appointee did communicate the change of circumstances to the Council's housing benefit officer, albeit the Tribunal held that there was no an official error because that was not communicated in writing and was incomplete). Accordingly, ***Hinchy*** could and should be distinguished.

27. The appellant was not questioning the "*internal administrative arrangements*" of the Council. He was not asserting that, for instance, the planning team should have notified the housing benefit team about a change of circumstances communicated orally or not communicated at all (as was the case in ***Hinchy*** concerning the passing of information from the DLA team to the IS team). Rather, the appellant submitted that it was an omission for a relevant officer of the housing benefit department to fail record the change of circumstances communicated orally when it would have been the rational and sensible action to take. That was supported by the case law dealing with housing benefit overpayments (rather than the different legal framework for IS, as in ***Hinchy***).

28. Mr Ogilvie-Harris submitted that ***JMA*** identified the types of case where an official error could occur, even where regulation 88(1) had not been complied with. On the facts of that appeal, Upper Tribunal Judge Mark identified two errors of law: (a) the first, as recognised by the Council, was "*failing at any time to require the information to be provided in writing*" (at [29]; (b) the second, not accepted by the Council in this case, was "*failing […] to properly record or pass on the information within the office*" (at [29]. That type of error was what Mr Commissioner Levenson could have been taken to mean in ***CH/2409/2005*** when he held "*but also are relevant questions as to whether and what information was disclosed at all*" (at [22]. It was important to note that Judge Mark used the word "*or*" between the two types of error identified in ***JMA***. He must be taken to have used his words diligently, and it was well known that, in law, the word "*or*" was disjunctive.

29. Accordingly, as to ***JMA***, he submitted that, if either of those two official errors had been identified, then the appeal would have succeeded because either one of them was an official error. That interpretation was confirmed by Judge Mark's earlier observation that

> "The errors in the present case were the failure at any time on the part of the council, so far as the evidence before the tribunal and indeed before me goes, to advise the claimant that changes of circumstances had to be notified in writing and more particularly the failure of the officer of the council to whom the information was given in September 2006 either to pass on or act on that information or to tell the claimant that she needed to put it in writing. I would add that had the officer acted properly, he would have ensured both that the information was properly provided and that the claimant was immediately able to provide full information as to her means so that an income-based award could be considered" (at [28]).

The use of the words "more particularly" suggested that he understood that the failure of a council officer to record or pass on information relating to a change of circumstances could, in and of itself, be an omission which amounted to an official error.

30. Applying the legal principles that whether an official error had occurred depended on all the circumstances in a case and not only the obligations under regulation 88(1), Mr Ogilvie-Harris submitted that the "omissions" were the omissions of the relevant officer

(a) to advise the appointee, when she tried to report a change of circumstances orally, that the effect of regulation 88(1) was that she needed to report it in writing;

(b) to ask her to complete a change of circumstances form;

(c) to record the change of circumstances notified orally by her;

(d) to ask her when the appellant had gone into hospital.

31. He submitted that (a) and (b) were official errors. He accepted that in ***JMA*** there had been no notification, whether in the letters from the Council or orally, that the claimant had to notify the Council of the change of circumstance in writing. However, whether there had been an official error was a question of fact and degree. The Tribunal only considered whether the Council had included in its information notice a section about the effect of regulation 88(1) and whether the appointee complied with the regulation. However, that did not inevitably mean that there was not an official error. As in ***JMA***, he submitted that "*if the officer acted properly, he would have ensured […] that the information was properly provided*" i.e. by telling the appointee that she was communicating the change of circumstances in the incorrect way and/or ask her to complete a change of circumstances form. At its highest, the evidence was that that did not happen; at its lowest, the Tribunal did not make sufficient findings of fact as to whether it did occur.

32. He further submitted that (c) was a mistake because the Council officer had information which was relevant and material to the continued payment of housing benefit and failed to record it so that either further inquiries could be made or the award could be suspended to prevent any further overpayment. The question as to whether that was an omission was not confined to whether the appointee complied with the regulation, but had to be answered taking the circumstances as a whole. As in ***JMA***, a reasonable council officer acting properly would have realised that a failure to record that information would lead to an overpayment of housing benefit and it was for that reason that the omission amounted to an official error.

33. Underlying the appellant's submission was the principle of good administration:

(1) the purpose of the official error regulation was to promote good administration and ensure that, where an official had made a mistake, individuals did not suffer as a result (by being subject to deductions from their benefits in the future).

(2) the common law, more broadly, had recognised that good administration was a principle of public law, see ***R v Monopolies and Mergers Commission, ex parte Argyll Group*** [1986] EWCA Civ 8 per Donaldson MR

(3) accordingly, in ***JMA***, when a local authority did not have a standard notification of the effect of regulation 88(1), and an officer became aware of a relevant and material change of circumstances and failed to act on it, that was an omission amounting to an official error

(4) similarly, in ***MB***, the failure to ask the right questions on a standard claim form was an official error because, clearly, that could be said to have undermined good administration: the local authority was the one which knew what information it needed and the claimant was the one who could, usually, provide that information

(5) however, when in ***Sier*** the claimant had not notified the change of circumstances to the relevant local authority at all, relying instead on the authority identifying a discrepancy between the address recorded on the claim and his pay slips, that was not an official error (and in a different context, see ***Hinchy***).

(6) the reliance by the Tribunal and the Council on regulation 88(1) as being determinative was both contrary to the decided cases and focussed overly on form over substance. The substance of the matter was that the appointee, a dedicated carer for various family members who at that time was under a great deal of stress, did notify the Council of the change of circumstances, a fact accepted by the Tribunal, even if it was not done in writing.

(7) it could not be said to be good administration for a local authority to do nothing when notified of a change of circumstances orally. A benefits officer acting properly would either have said to the appointee that she needed to report the change of circumstances in writing or otherwise acted on the information notified to it.

34. Mr Ogilvie-Harris turned to the Council's second argument, namely that, when the appointee attended the Council's offices, she did not have authority to communicate a change of circumstances to it.

35. He made three points in reply to that submission:

(1) the Council's officer had in fact accepted that the appointee had authority to act for the appellant. The documentation provided on 2 June 2016 was added to the appellant's housing benefit file. The relevant officer must therefore have accepted that the appointee had authority to act because otherwise those documents would not have been added to the file. That may have been the case because the ESA and PIP letters clearly indicated that the appointee had a power of attorney for the appellant and that appeared to be what the Tribunal accepted in fact (see paragraph 14 of the statement of reasons). The appellant's position was that the relevant officer should also have recorded that there was a change of circumstances or asked the appointee to complete a change of circumstances form.

(2) it could not be correct to say that there was no obligation on a local authority to act where a person reported a relevant and material change of circumstances, even if he had not provided an authority form. For example, what if, on different facts, a claimant had urgently been admitted to hospital and was unable to sign a consent form (say, because he was in a medically-induced coma)?

(3) if it was not accepted that the Council had accepted that the appointee had authority to act for the appellant or that a change of circumstances did not need to be recorded where the notifying individual did not have authority, then he submitted that there needed to be further factual findings on the point. The Tribunal's only consideration of authority was at paragraph 14 where it held that "*his mother … had been the DWP appointee for his social security benefits*". The Council was, in essence, arguing that the factual finding was an error of law. If that were the case, the Upper Tribunal should determine for itself whether, on the facts, the appointee did have, and the Council should

have accepted that she had, authority to act, or remit the matter to the Tribunal for redetermination.

36. As to causation, Mr Ogilvie-Harris submitted that the test under regulation 100(3) was independent of the obligations under regulation 88(1). For instance, in ***CH/2409/2005***, Mr Commissioner Levenson rejected "*the argument that failure to comply with regulation 65(1) [duty to notify of the change of circumstances in writing] necessarily and inevitably means that a claimant has caused or materially contributed to the omission*" (at [22]). Importantly, considering legislative intent, neither regulation 88 nor regulation 100 referred to each other.

37. Mr Commissioner Levenson went on to list non-exhaustive and non-cumulative questions to ask when determining whether a failure to comply with the predecessor to regulation 88(1) meant regulation 100(3) could not be satisfied: was any information at all provided; what had the claimant been asked to do; what was the practice of the local authority? Accordingly, in all cases, the question was one of "*common sense*" causation (***Sier***).

38. There could be cases, as with the appellant's case, where an official error could occur even if regulation 88(1) had not been complied with. The second type of error identified in ***JMA*** was such a case.

39. The test was whether the appointee had contributed to the official error, not the overpayment. If it was accepted that the failure to ask the appointee to complete a change of circumstances form, the failure to record a change in circumstances notified orally and the failure to ask the relevant questions (regarding the 52 week rule) amounted to official errors, the appointee could not be said to have contributed to those errors. From a common sense point of view, the appointee did not do anything to induce the officer to make those errors. Those were omissions committed by the officer and by the officer alone.

40. From a common sense point of view, taking into account the stressful period of the appointee's life, being a carer for her severely disabled son and other family members, and in circumstances where she did notify the Council, albeit orally, of the change in circumstances, i.e. that the appellant had been admitted to hospital, and that this was not a case, as with ***Sier*****,** where there was a suggestion or implication that the appointee was trying to mislead the Council, it was submitted that the appointee did not contribute to the official errors.

41. As to the criteria in regulation 100(2), the appellant submitted that his mother could not have been expected to realise that there was an overpayment:

(1) the housing benefit rules concerning entering and leaving hospital were relatively complex and, generally, it would not be reasonable for a claimant to realise that an overpayment was occurring when (a) he had notified the relevant authority that he or a family member had been admitted to hospital and (b) nonetheless housing benefit continued to be paid.

(2) benefit claimants should not be expected to have a comprehensive understanding of the content of the 2006 Regulations unless explained to them. For example, where a decision letter informed a person to notify the local authority when a member of the household had entered or left hospital, that person could be taken to know that rule. That enabled a claimant to know that a person entering into hospital might be material to the claim and that he should notify the local authority. On the facts of the case, there was undoubtedly notification of the content of the rule: page 129 of the bundle stated that notification of a change of circumstances should occur where "*someone goes into or leaves hospital or prison*". The appointee did, albeit orally and late, notify the Council that her son had gone into hospital.

(3) in the case of the 52-week rule, that was not set out in the information section of decision letters. The ambit of the rule was not straightforward:

(a) the starting point was regulation 7(1): "*a person shall be treated as occupying as his home the dwelling normally occupied as his home*"

(b) a person who entered hospital might, nonetheless, satisfy regulation 7(1) because his accommodation from which he had been (e.g.) sectioned was still the dwelling which he normally occupied as his home

(c) to identify when the 52-week rule applied, one must look at the criteria in regulation 7(16)

(i) the exception applied to a person who was "temporarily absent from" his home: regulation 7(16)

(ii) he must intend to return home: regulation 7(16)(a)

(iii) the dwelling must not have been let or sublet: regulation 7(16)(b)

(iv) the person must be resident in a hospital as a patient: regulation 16(c)(ii)

(v) the temporary absence must be likely to exceed 52 weeks (except in exceptional circumstances): regulation 16(d)

(vi) then one must look to regulation 7(17) which set out the 52-week rule (if all the criteria in regulation 7(16) applied).

42. Accordingly, as a matter of principle. if the content and effect of the 52-week rule was not explained to a claimant or a person acting on his behalf, it would generally not be reasonable to expect a person to know that housing benefit was being overpaid in circumstances, where he had notified the authority that the claimant had gone into hospital.

43. The Council did not notify the appointee of the ambit and effect of the 52-week rule and therefore regulation 100(2) was not satisfied.

44. In any event, if called upon to give evidence, the appointee would say that at the time she was the primary carer of both the appellant and other family members. It was a very stressful time and she had a lot on her plate.

As she notified the Council that her son had gone into hospital, she assumed that the continued payment of housing benefit was correct and, understandably, did not question it.

45. Accordingly, the appointee did not and could not reasonably have been expected to know that an overpayment was occurring.

46. In conclusion, Mr Ogilvie-Harris submitted that the appeal should be allowed, the decision set aside and remade to the effect that the overpayment was not recoverable by virtue of regulation 100(1):

(a) for the purposes of regulation 100(3), the overpayment arose in consequence of an official error, viz. the failure of the relevant officer to advise the appointee, when she tried to report a change of circumstances orally, that the effect of regulation 88(1) was that she needed to report it in writing; and/or his failure to ask her to complete a change of circumstances form; and/or his failure to record the change of circumstances notified orally by her; and his failure to ask when the appellant had gone into hospital; and those errors were the officer's and the officer's errors alone. The appointee did not cause or materially contribute to those omissions for the purpose of regulation 100(3). Had the errors not occurred, the overpayment would not have arisen, as housing benefit would have ceased to be paid on 2 June 2016.

(b) for the purpose of regulation 100(2), the appointee could not, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that there was an overpayment, in circumstances where she had notified the Council that her son had gone into hospital, and she had not been notified as to the content of the 52-week rule under regulation 7(17) and, accordingly, there was no reason for her to question the continued payment of housing benefit.

Analysis

Duty of Disclosure

47. Mr Ogilvie-Harris accepted that there had not been compliance with the duty to notify the Council of a change of circumstances as set out in regulation 88(1). In my judgment he was right to do so. There was no written notification of the change of circumstances as set out in regulation 88(1)(a) nor any telephone communication as required by regulation 88(1)(b). Nor were there any factual findings which would have allowed him to rely on regulation 88(1)(c) since it could not be demonstrated that the Council had agreed to accept any other means of communication in this particular case.

48. Regulation 88 deals with the method or manner of the duty of notification. What, then, of the substance of the appointee's disclosure? It was the Tribunal's finding of fact that, whilst the appointee had told the benefit office that her son was in hospital, she did not mention the duration of his stay. The Council's letters (such as that on page 129) had made it clear that there was an obligation to notify it of a change of circumstances such as the claimant going into hospital, but nothing was said therein about the duration of any such stay in hospital. Was there nevertheless any obligation on her part to disclose the length of the stay in hospital?

49. The Tribunal found that the appellant's mother had not disclosed a material fact, namely the duration of her son's stay in hospital, and grounded that obligation in regulation 101(2)(1)(b). After some initial hesitation as to the application of the regulation in question, I am satisfied that the Tribunal was right to do so. Regulation 101 is concerned with the identity of the person from whom recovery is sought. It was common ground that regulation 101(1) had no application on the facts of the Case (as indeed it rarely does, given the narrowness of the exemption from liability) and the Tribunal therefore turned to consider regulation 101(2)(1).

50. What regulation 101(2)(1)(b) provides (with emphasis added) is that

> "For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), where recovery of an overpayment is sought by a relevant authority--
>
> (a) …
>
> (b) *in a case where an overpayment arose in consequence of* a misrepresentation of or *a failure to disclose a material fact* (in either case, whether fraudulently or otherwise) by or *on behalf of the claimant*, or by or on behalf of any person to whom the payment was made, *the overpayment is only recoverable from any person who* misrepresented or *failed to disclose that material fact* instead of, if different, the person to whom the payment was made; or
>
> (c) …".

51. The party to whom the payment of housing benefit was paid was Clarion, but on the facts of the case the overpayment was not recoverable from Clarion (and there is no appeal against that aspect of the decision). It was recoverable only from the appellant, but only on the basis that he (or his mother on his behalf) had not disclosed a material fact. A material fact is a fact which did make a difference to the decision in question, see ***NSP v Stoke-on-Trent CC & GP (HB)*** [2022] UKUT 86 (AAC). In this case the failure to disclose the duration of the stay in hospital was a failure to disclose a material fact because if the duration of the stay had been disclosed the overpayment would not have occurred.

52. Whether a fact is or is not a material fact does not depend on whether the appellant or the appointee knew or appreciated that it was or might be a material fact, but upon its objective importance under regulation 101(2). Mr Ogilvie-Harris submitted that the appellant's mother could not be expected to know the existence or the complexities of the 52-week rule. I accept that submission, but that is relevant to what she could or could not reasonably have been expected to realise under regulation 100(2), were that inquiry to be

essayed, not to the prior question as to whether the duration of the hospital stay was a material fact for the purposes of regulation 101(2).

53. Mr Ogilvie-Harris sought to argue that the facts of this case were similar to those in ***JMA***, but in my judgment they were materially different. The point in ***JMA*** at [26] was that the local authority had failed to tell the claimant that her information as to change in circumstances had to be in writing *in the first place*, and when she went to their offices to give them the information, a council officer *again failed* to advise her to put it in writing or, if it was necessary to do so, to provide the same information to the housing benefit section. That double failure (viz. failure to advise in the first place and the later failure to advise again) was a mistake by the council and it could not be said that the claimant in any way caused or materially contributed to that mistake. By contrast here the appellant *had* clearly been told (see inter alia page 129) that changes of circumstances did need to be notified in writing. The Tribunal did not therefore fail to make relevant inquiries as to whether the factual circumstances in ***JMA*** were analogous to the current appeal; they were not.

54. As Upper Tribunal Judge Mark explained in ***JMA*** (with emphasis added) that

> "24. The council also relies upon the provisions of regulation 88(1) of the Housing Benefit Regulations 2006 which, as in force in September 2006, provided that the claimant was "under a duty to notify that change of circumstances by giving notice in writing to the designated office" ...
>
> 25. The council is correct that the claimant had a duty to notify the designated office in writing. *On the other hand, it had never, so far as the evidence goes, told the claimant that a notification had to be in writing*. *Both the form referred to at page 6 of the written submissions to the tribunal and the notices at the foot of pages 15-21 of the file do not specify any particular form of notification, and when the claimant went to the council offices to report the change of circumstances, she was not told by the council tax officer that she saw either that she should put the information in writing or that she should separately inform the housing benefit section*. I note also

that if, as appears to be the case, the offices to which she went were the designated offices for both council tax and housing benefit, then a single letter to that office would appear to have sufficed.

26. It is self-evident that claimants need help to know what they are to do to comply with the rules as to benefits. That is why they are given instructions as to what they are to do if there is a change of circumstances. *In this case the council failed to tell the claimant that her information as to change in circumstances had to be in writing, and when she went to their offices to give them the information, a council officer failed again to advise her to put it in writing or, if it was necessary to do so, to provide the same information to the housing benefit section.* That was a mistake by the council acting as such, and it cannot be said that the claimant in any way caused or materially contributed to that mistake.

27. In this context, I note that in regulation 100 of the Housing Benefit Regulations 2006 the questions are (1) whether the overpayment was caused by a mistake by the relevant authority, and (2) whether the mistake was caused or materially contributed to by, in the present case, the claimant.

28. The errors in the present case were the failure at any time on the part of the council, so far as the evidence before the tribunal or indeed before me goes, to advise the claimant that changes of circumstances had to be notified in writing and more particularly the failure of the officer of the council to whom the information was given in September 2006 either to pass on or act on that information or to tell the claimant that she needed to put it in writing. I would add that had the officer acted properly, he would have ensured that both that the information was properly provided and that the claimant was immediately able to provide full information as to her means so that an income-based award could be considered. Instead, when Mr. Slade became aware of the position in the following year, he actively discouraged the claimant from trying to have the original superseding decision revised on the ground that the claimant's income may have still been so low for all or part of the time as to entitle her to benefit, telling her, incorrectly and so far as I can see without any basis whatsoever, that to do so would adversely affect her appeal.

> 29. I have been referred to *R(H) 10/08*, where it was held that for an omission to pass on information to the benefits service amounted to an official error, it would have to be based on either a reasonably based expectation that the information would be passed on to the benefits service or the existence of internal arrangements or practices for passing on information. That was a case where the information was given to a district housing office, not to the office administering council tax and housing benefits. Here the information was communicated to the benefits service, and the errors were those of the benefits service in failing at any time to require the information to be provided in writing, or to properly record or pass on the information within the office. Those errors were in no way induced by the claimant, who was complying with the instructions she had been given by the council."

55. I do, however, accept Mr Ogilvie-Harris's submission that it does not follow that, because the appointee failed to disclose a material fact, there was therefore no error on the part of the Council or that failure to comply with regulation 88(1) or failure to disclose the duration of the stay in hospital necessarily and inevitably means that a claimant has caused or materially contributed to the omission. As Mr Commissioner Levenson explained in ***CH/2409/2005***

> "22. I reject the argument that failure to comply with regulation 65(1) necessarily and inevitably means that a claimant has caused or materially contributed to the omission. To accept this would be irrational. Neither regulation 65 nor regulation 84 provides this, and the wording of regulation 84 is not consistent with this proposition. Certainly, the failure to give information in writing might be relevant in an appropriate case, but also relevant are questions as to whether and what information was disclosed at all, whether a claimant has done what he was asked to do and, in relation to the practice of this particular authority, whether an official form specifically instructed that information be given over the telephone or in person."

56. On the findings of the Tribunal, the benefit officer was told that the appellant was in hospital. He did not, however, ask the obvious question which arose from that partial disclosure, namely for how long he had been in

hospital (or, if he did, he did not write it down). If he had, the position would have become clear and the overpayment would not have been made. That, it seems to me, was an error on the part of the Council's officer and the officer cannot be absolved on the basis that the disclosure was not in writing or was only partial disclosure. In summary, the error by the Council was (d) in Mr Ogilvie-Harris's list, failing to ask the obvious follow up question, possibly augmented by (d) (if indeed the officer was in fact told the position in answer to his question, but failed to write it down and act upon it). That is consistent with the findings in ***JMA*** at [29] that the failures of the Council encompassed not only the original failure to advise the need to put matters in writing (which is not this case), but also

> "more particularly the failure of the officer of the council to whom the information was given in September 2006 either to pass on or act on that information or to tell the claimant that she needed to put it in writing".

57. I do not, however, accept Mr Ogilvie-Harris's suggested errors (a) and (b). Having already told the appellant that a change of circumstances needed to be disclosed in writing (as demonstrated by the notes on page 129), I am satisfied that the benefit officer did not need to repeat that instruction to the appointee on 2 June 2016 when she appeared in front of him.

58. Nor did he need to tell her to complete a change of circumstances form there and then. There is no suggestion in this case that the appellant's mother has any problems with literacy, but difficulties with literacy may arise in other cases if there were such an obligation.

59. Moreover, it is highly artificial to require a written notification when a claimant or appointee is telling the officer something orally at the counter which could easily be clarified by asking the next obvious question (viz. how long the hospital stay has lasted) and then immediately recorded by the officer in written form which would admit of no further delay in dealing with the matter (as would inevitably arise with a requirement for a further written

communication or the requirement to fill in a form by someone with difficulties as to literacy).

60. In reaching the conclusions which I have set out above concerning error on the part of the Council's officer, I have also derived assistance from what Upper Tribunal Judge Wikeley said in ***MB*** about failure to ask questions (in that case on standard claim form, but the principle is the same):

> "40. This starting point is supported by the authority of the decision of the House of Lords in *Kerr v Department for Social Development*. Omitting the fourth principle, which has no application here, Lord Hope of Craighead held as follows (at paragraph [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:
> >
> > (1) 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.
> >
> > (2) 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.
> >
> > (3) 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."
>
> 41. The same point was put, perhaps rather more pithily, by Baroness Hale of Richmond in her opinion [in *Kerr v Department for Social Development*]: "the system places the burden upon the department of asking the right questions and upon the claimant of answering them as best he can" (at paragraph [58]). Thus the benefits adjudication system "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" (at paragraph [62]).

…

45. … the local authority seems to contend that the overpayment was the Appellant's fault as she had declared that Jack was part of her household. As a matter of plain English, Jack was part of her household, albeit for part only of the week. The Appellant could not be expected to know of either the existence of, or the significance of, the rules set out in regulation 20(1) and 20(3). Rather, given regulation 86(1) and the principles expounded in *Kerr*, the onus was on the council to ask the relevant questions – including the particular question on the HCTB1 form about any child's usual address which it had omitted.

…

47. … Looking at the matter in another way, this local authority's standard claim form asked a specific question which was relevant to the relatively unusual situation in which there was *exactly* equal (i.e. 50:50, and not 51:49 or any other ratio) shared care (i.e. the question about receipt of child benefit). Yet it failed to ask any question at all that would have revealed whether there was any other degree of shared care. Again, however, just as the local authority did not have to ask the question "is this child subject to a shared care or other residence order?", I do not say that the local authority should have asked "is this child subject to a shared care arrangement?" The question that the local authority should have asked, so as to be in a position to assess the Appellant's entitlement to housing benefit properly, was simply what was the child's "*usual address, if different from yours*."

48. So, was the local authority's omission to ask a question on its standard claim form about the child's usual address an "official error" for the purposes of regulation 100? In my view it clearly was. I have explained above why I am not persuaded by the local authority's arguments. The tribunal judge was right in saying this was not a failure to amend the claim form to accord with amending legislation, as with *CH/3679/2002* and *CH/4428/2006*. Rather, however, it was a failure to provide a claim form that was fit for purpose in terms of the fundamental principles of eligibility for housing benefit. The reasonableness, and indeed in these circumstances the necessity, of asking a question about whether the child lived at any other address is

> demonstrated by the HCTB1 national form. The earlier authorities of *de Grey* and *Sier* both concerned basic conditions of entitlement, as here. But both of those cases concerned relatively unusual if not rare factual circumstances.
>
> **…**
>
> 50. My conclusion, accordingly, is that the failure by the local authority to ask a question about the child's usual address was, in the circumstances of this case, an official error."

61. However, I also bear in mind that he went on to say

> "53. For the reasons set out in detail above, the local authority's omission to ask a question directed to the child's usual address was an official error within regulation 100(2) of the 2006 Regulations. However, this is not a complete 'get out of jail free' card for the Appellant. As well as showing the existence of an official error, the Appellant must also show (1) that she did not cause or materially contribute to that omission; and (2) she could not reasonably have been expected to realise that there was an overpayment."

62. Subject to a brief excursus on the question of authority, to deal with the argument raised by the Council in its submissions, I will turn to the question of causation.

Authority

63. The appellant's mother was his appointee for the purposes of his DWP benefits, as the Tribunal found in paragraph 14 of the statement of reasons. It is not therefore apparent why the Council should have regarded the position as being different in relation to his housing benefit, but if it did its officer should have made the position clear at the outset on 2 June 2016. There is nothing to suggest that he did say anything about the appointee not having any authority to act on her son's behalf in relation to housing benefit or that in the absence of any authority he was not able to receive and act upon any information which she might impart.

64. In the absence of any such statement by the officer, it seems to me that the inference to be drawn from the evidence is that he treated her as having authority to act on her son's behalf, although it also seems to me that the material point is that he did not question her authority when he spoke to her or decline to receive what she was proffering to him rather than attributing any particular significance to the purely administrative act of putting the papers which she produced on to the housing benefit file after the event.

65. I do not therefore accept the Council's argument as to the absence of authority on the facts of this case.

Causation

66. I therefore turn to the question of causation. In the Court of Appeal in ***Sier***, Latham LJ said, in speaking with reference to the decision in ***Duggan v Chief Adjudication Officer*** (1998) (appendix to *R(SB) 13/89*):

> "23. The argument on behalf of the claimant was that the payments had been made not as result of any failure on his part but were made by reason of the failures of the adjudication officer to make the appropriate enquiries.
>
> 24. The Court of Appeal dealt with that argument shortly in the judgment of May LJ, in a passage in which he made it clear that the question was not one which could be answered simply by saying that a mistake had been made by the adjudication officer. That was a cause. The section required those administering the scheme to determine whether or not, whatever other cause there may have been, the claimant had acted as described in section 20(1). He undoubtedly had in the case in question and accordingly he was caught by the provisions of that section and was liable to make repayment of the overpayments.
>
> 25. It seems to me that that is a good example of the Court carrying out the exercise which Lord Hoffmann indicates as the appropriate exercise in determining the approach to causation in any given case. In the present case, one has to have regard to the general legislative purpose, which seems to me to be clear. Parliament has laid down in the Regulations that a person is to be relieved of the obligation to repay an overpayment when

> that has been occasioned by an administrative mistake and not by any fault on the part of the recipient. That seems to me to be the basic thrust of the Regulation and one should approach the meaning of the word "cause" and its application to the facts on that basis.
>
> 26. Bearing that in mind, I consider that Richards J was correct in concluding that the failure to send form NHB8 to Cambridge City Council had not "caused" the overpayment even if that failure did amount to an official error. The overpayment occurred because the appellant continued to claim Housing Benefit for the Cambridge property and failed, in breach of his duty under Regulation 75 of the 1987 Regulations, to notify the Cambridge City Council of what in my judgment was clearly a relevant change in his circumstances and one which he would have appreciated. The administrative failure, if that is the appropriate way of describing it, to send form NHB8 of the Cambridge City Council did not cause any payments to be made. The most that could be said is that as a result of that failure Cambridge City Council was not alerted to the fact that the appellant was no longer entitled to the relevant payments. But it seems to me that the answer to the question posed by the Regulation is clear: this was not an overpayment caused by official error and accordingly the Regulations do not relieve the appellant of the obligation to repay the overpayment, which is the primary rule in such circumstances."

67. For his part Simon Brown LJ said

> "29. On Mr Stagg's submission, in a case like the present, the fact that the primary cause of the relevant overpayment was the appellant's own failure, in breach of his statutory duty, to disclose the important change in his circumstances, rather than the breakdown of the department's non-statutory back-up system, is a complete irrelevance; unless perhaps it were to bear on the residual question arising under regulation 99(2) as to whether the claimant could reasonably have been expected to realise that it *was* an overpayment. The strength of that submission depends upon treating the question whether the appellant caused, or materially contributed to, the department's mistake as a wholly discrete one. On that approach, of course, the appellant was not responsible for the failure of the department's back-up system.

> 30. Such a result, however, seems to me so entirely surprising and unsatisfactory that it requires one to approach regulation 99(3) rather differently. In my judgment a single composite question falls to be asked under regulation 99(3). One must ask: "was the overpayment the result of a wholly uninduced official error, or was it rather the result of the claimant's own failings, here his failure in breach of duty to report a change of circumstance?" The answer to that question on the facts of this case is, of course, self-evident.
>
> 31. That approach, to my mind, underlies and informs what Hale J (as she then was) said in the observation to which our attention was drawn in *Warwick DC v Freeman* 27 HLR 616 at 621. More importantly, however, it accords with Lord Hoffmann's speech in *Environment Agency v Empress Car Co Ltd* [1999] 2 AC 22 at 29, in the passage already cited by Lord Justice Latham. If one asks the purpose for which the question arises under regulation 99(3) as to whether the overpayment was caused by an uninduced official error, the common-sense answer is so as to distinguish that sort of case from a case where the claimant himself is substantially responsible for the overpayment. It would be remarkable indeed if the claimant was liable to make repayment in a case where he merely contributed to what might be a fundamental error on the part of the department, and yet wholly escapes such liability even when himself primarily responsible for the overpayment."

68. Upper Tribunal Judge Howell QC summarised the effect of the decision in ***Sier*** in ***SN v Hounslow LBC*** [2010] UKUT 57 (AAC), [2010] AACR 27:

> "9. In relation to any particular amount overpaid the causative part of the inquiry (aspects (1)–(3) in paragraph 7) requires a practical and substantive, not a philosophical and abstract, approach. It is the substantial cause of that amount being overpaid that matters: *R (Sier) v Cambridge CC HBRB* (unreported 8 October 2001) [2001] EWCA Civ 1523. As Simon Brown LJ said in a short concurring judgment in that case, that part of the inquiry really amounts to asking the single composite question whether the overpayment in question was the result of a wholly uninduced official error, as distinct from the kind of case where the claimant himself is substantially responsible for the overpayment: that is a question to be answered in a common-sense way and if put in those terms it is usually easy to see the answer on the facts."

69. Referring to ***Sier*** he said

> "19. … The unanimous (and perhaps not very surprising) conclusion was the point already made in paragraph 9 above, that a claimant who has got benefit by not disclosing relevant facts is not able to turn the case into one of "overpayment caused by official error" by saying that if only officialdom had been more vigilant he would have been spotted.
>
> …
>
> 21 … Mere lack of contribution to an administrative step that never took place was not of course an answer to recovery of an overpayment whose actual cause had been the claimant's own failings, there his failure in breach of duty to report a change of circumstances."

70. I am as well placed as the First-tier Tribunal to answer the question on the material which was before it and which is also before me. In my judgment if one asks: "was the overpayment the result of a *wholly* uninduced official error, or was it rather the result of the claimant's own failure in breach of duty to report a change of circumstance?", the answer is clear. The mistake on the part of the Council was in part due to its officer's failings, but it was also due to the failure to disclose a relevant – and indeed a material - fact (as to the duration of the hospitalisation). Looking at the precise wording of regulation 100(3), if a claimant (or a person acting on his behalf) has failed to disclose a material fact, the reality is that he has materially contributed to the mistake, act or omission on the part of the Council.

71. To paraphrase Judge Howell QC, a claimant who has got benefit by not disclosing a relevant fact (as required by regulation 101(2)(b) as to the duration of his hospitalisation) is not able to turn the case into one of overpayment caused by official error by saying that, if only officialdom had been more vigilant, the problem would have been spotted.

72. I am therefore satisfied that the appellant (or his mother acting on his behalf) has failed to disclose a material fact and that that failure materially

contributed to the mistake, act or omission on the part of the Council, such that the overpayment is recoverable.

Regulation 100(2)

73. In the light of that conclusion, that the appointee did materially contribute to the mistake on the part of the Council, I do not need to deal with the issue which would potentially arise under regulation 100(2), namely whether the appellant or anyone acting on his behalf could or could not, at the time of the receipt of the payment or any notice relating to it, reasonably have been expected to realise that it was an overpayment. The Tribunal made no findings of fact about that matter, as it did not need to do so in the light of its conclusion and in the absence of any such findings it would have been invidious for me so to do, notwithstanding the disinclination of both parties to have the matter remitted for a further hearing on that issue and their invitation to me to decide that matter for myself, particularly since it would involve making findings as to the appointee's subjective knowledge i.e. whether with her experience, abilities and education she could reasonably have been expected to realise that there was an overpayment. It would have been for the person seeking to rely on the exception to prove that she could not reasonably have been expected to realise that an overpayment was being made and not for the authority to prove that she could reasonably have been expected to realise that an overpayment was being made, see ***CH/4918/2003*** (paragraph 16) and ***CH/3439/2004*** (paragraph 22). However, given my conclusions on the question of causation under regulation 100(3), the question of the impact of regulation 100(2) does not arise for decision.

Conclusion

74. It follows from what I have said that I do not agree with the manner in which the Tribunal expressed itself in paragraph 32 of the statement of reasons:

> "32. It follows that [his mother] failed to disclose a material fact, and that there was no official error by the Council."

75. It would be more accurate to say that the appointee failed to disclose a material fact and therefore materially contributed to the overpayment so that, notwithstanding error on the part of the Council officer, there was no official error within the meaning of regulation 100(3), or perhaps more colloquially that there was official error on the part of the Council, but that the appointee failed to disclose a material fact and therefore materially contributed to the overpayment so that the overpayment is recoverable. In any event, although I do not agree with the overly compressed formulation adopted by the Tribunal, that does not constitute a material error of law since the result of the appeal would have been the same even if the Tribunal had gone on to consider the question of causation.

76. Accordingly, and notwithstanding Mr Ogilvie-Harris's able submissions and his industry in deploying his submissions both at the permission stage and on the substantive appeal, the appeal is dismissed.

77. I am bound to say, however, that the situation in which the appellant therefore finds himself is a very unfortunate and a very unhappy one, through no fault of his own. I am, nevertheless, satisfied that his lack of mental capacity is not a relevant factor for the purposes of the housing benefit legislation, although it may well be a relevant factor in the Council's consideration of what it should do in the light of this decision.

78. As the Tribunal said at the end of its decision, it has no jurisdiction over whether the Council decides to exercise its discretion to recover the overpayment from the appellant, given his mental health condition. Nor do I, but no doubt the Council will consider very carefully what it should do given that the appellant has very significant and profound mental health issues of many years' standing, including detention in a mental hospital for over 3 years.

Mark West
Judge of the Upper Tribunal

Signed on the original 26 May 2023