IN THE UPPER TRIBUNAL **Case No.** CE/2388/2015
ADMINISTRATIVE APPEALS CHAMBER

INTERIM DECISION

1. This is an appeal by the Claimant, brought with my permission, against a decision of a First-tier Tribunal sitting at Sutton on 21 May 2015. For the reasons set out below that decision was in my judgment wrong in law and I set it aside. As indicated at the hearing before me, I intend to re-make the First-tier Tribunal's decision, rather than remit the matter to a fresh First-tier Tribunal for redetermination. With a view to re-making the First-tier Tribunal's decision, and in exercise of the power in s.12 of the Tribunals, Courts and Enforcement Act 2007 I make the findings of fact set out below, which include a finding that the Claimant and his wife were at the material time members of the same household. However, this is only an interim decision because, as explained in paras. 57 to 62 below, I am unable on the present evidence to decide whether the Secretary of State can establish a ground which justifies changing the original decision in 2009 or 2010 which awarded income-related employment and support allowance. **As explained at the end of this interim decision, I require further evidence to decide that. The parties' attention is drawn to the Direction at the end of this decision.**

Introduction

2. The main issue which the First-tier Tribunal had to decide was whether at the material time the Claimant and his wife were "members of the same household". If they were, the Claimant did not at the material time satisfy one of the conditions of entitlement to income-related employment and support allowance (ESA), because his wife was in remunerative work. The First-tier Tribunal decided that they were members of the same household.

3. I held an oral hearing of this appeal, at which the Claimant appeared in person and the Secretary of State was represented by Mr Stephen Cooper of the Office of the Solicitor to the Department for Work and Pensions.

4. When acceding to the Claimant's request for an oral hearing of the appeal I had indicated that my provisional view was that the First-tier Tribunal's decision would fall to be set aside for inadequacy of reasoning, and that the parties should prepare for the hearing on the basis that I would re-hear the Claimant's evidence, with a view (if I were indeed to set aside the First-tier Tribunal's decision) to re-making the First-tier Tribunal's decision myself, rather than remitting the matter for rehearing by a fresh First-tier Tribunal.

5. Accordingly, at the hearing I heard full evidence from the Claimant. At the hearing he showed me a number of documents which had not previously been included in the papers. He has since the hearing provided copies of these. As I have decided to set aside the First-tier Tribunal's decision as wrong in law, I find it convenient to explain my reasons for that conclusion after referring to the legal background and the evidence, and making findings of fact.

The legal background

6. By para. 6(1)(f) of Schedule 1 to the Welfare Reform Act 2007 one of the conditions of entitlement to income-related ESA is that the claimant "is not a member of a couple the other member of which is engaged in remunerative work." By para. 6(5):

> "couple" means
>
> (a) two people who are married to …….. each other and are members of the same household;
>
> (b) two people who are not married to ……. each other but are living together as a married couple otherwise than in prescribed circumstances."

7. The word "household" is not defined in the legislation.

8. In CIS/671/1992 the Commissioner said:

> "It seems to me ….. that something more than mere presence in a place is necessary before those present can be said to constitute a household; there must be I should have thought some collectivity, some communality, some organisation. As was said in Santos v Santos [1972] 2 All ER at 255: "household is a word which essentially refers to people held together by a particular kind of tie, even if temporarily separated …" Furthermore, it appears to be of the essence of "household" that there is something which can be identified as a domestic establishment."

9. In para. 19 of R(SB) 4/83 the Commissioner said:

> ""Household" or "member of the same household". Neither of these terms has any technical meaning in general usage nor is either term a term of art in the general law of the land. The terms fall, accordingly, to be given their normal, everyday meaning; and their application by the determining authorities is primarily a matter of fact. ….It is a matter of common-sense and common experience."

10. In CIS/072/1994 Mr Commissioner Rowland said (at para. 5):

> "Whether two people are members of the same household depends very much on the particular circumstances of the case. The extent to which assistance can be derived from Commissioners' decisions in other cases varies according to the degree of similarity between the facts of those cases and the facts of the case under consideration. …….I think that the tribunal placed too much weight on the fact that the claimant and her husband "continued to be joint tenants with shared responsibilities" A joint household is shown by the way people actually live, coupled with the necessary attitude of mind (i.e. an acceptance by at least one party that the marriage is in truth at an end – see *Santos v Santos)*, but it does not depend on their legal liabilities. The respective legal liabilities of the parties may throw some light on their attitude of mind but that depends on the extent to which there are alternative explanations for the existence of joint (or separate) liabilities."

11. In that case the Commissioner substituted his own decision that the claimant and her husband had ceased to be members of the same household. He was of the view (para. 8) that

> "the only finding of the tribunal suggesting that the claimant and her husband were maintaining a common household within their home was that she washed his shirts……It seems to me that that limited cooperation is insufficient to show that the claimant and her husband were living together, if in all other respects they were living apart."

12. In *CJSA/1321/2007* Mr Deputy Commissioner White said:

> "Matters which should be considered in coming to a common sense and realistic conclusion overall commonly include:
>
> - the circumstances in which the appellant and his wife came to be living in the same house
> - payment for the accommodation made by the appellant;
> - arrangements for the storage and cooking of food;
> - separate eating arrangements;
> - domestic arrangements such as cooking, cleaning, gardening, and bits of household maintenance;
> - the financial arrangements
> - evidence of family life."

The facts in outline

13. On the basis of the Claimant's evidence, and the documents, I find the following facts. They are for the most part uncontroversial.

14. The Claimant is a man now aged 59. He suffers from a number of health problems, namely dumping syndrome following a partial gastrectomy and duodenectomy, gastro-oesophageal reflux disease associated with a hiatus hernia, anxiety with depression, and asthma with hyperventilation. Lung function tests suggest early obstructive airways disease consistent with asthma, which at November 2015 was not well controlled.

15. He came to this country from Kuwait in 1990, and in 1991 he purchased his present accommodation, a 2 bedroom flat in Sutton, Surrey, with the aid of an endowment mortgage of about £51,300.

16. On arrival in this country he worked as the sole representative here of a company specialising in transportation. When that company ceased operations here in 1995 he worked successively for other companies including BP and Mobil, but his health deteriorated and he had difficulty working from around the late 1990s, the main difficulties being caused by the problems with his stomach and chest.

17. He married his wife, who is now aged 40 (19 years younger than the Claimant) and of Iraqi origin, in June 2004. (I note that the marriage certificate describes the Claimant's profession at that time as being that of a translator). An

indication of the nature of their backgrounds is that the certificate shows the Claimant's father as being a retired barrister and the Claimant's wife's father as being a professor of paediatrics.

18. Before the marriage the Claimant had been living on his own in the flat, and afterwards they lived together as husband and wife, forming one household, in the usual way. Their son was born in March 2005.

19. The Claimant had been in receipt of incapacity benefit and income support, as a single person, for some at least of the time between about the late 1990s and the time of his marriage. He duly informed the Department about the marriage, and he then claimed on the basis of being a member of a couple. As his wife did not initially work, and as far as I am aware had no capital or other income, that is likely to have resulted in an increase in benefit. The income support included assistance with interest payments on the mortgage.

20. The Claimant's wife studied for and obtained a qualification in pharmacy, and began to work as a pharmaceutical professional in July 2008, which she continues to do. The Claimant told the FTT that he believed that by around the time of the remortgage in January 2014 (see below) his wife was earning £18,000 to £20,000 a year. The Claimant had also attempted from time to time to work, notwithstanding his condition, and did have employment for about a year from August 2008, during which time payment of benefit of course ceased.

21. The Claimant's evidence is that while they were both working household expenses were in effect shared in that he paid the mortgage and the whole of bills for energy, water etc, while his wife paid for food and clothes and other expenses such as travel expenses. They had and continue to have separate bank accounts.

22. However, relations between the Claimant and his wife had been deteriorating, and the Claimant says that in August 2009, following another dispute, they agreed that they would live separately. He started to sleep in the lounge. I will make detailed findings below in relation to their living arrangements from about August 2009.

23. In September 2009, when the Claimant was unable to continue working, he claimed employment and support allowance, but as a single person. He says that he fully disclosed the circumstances in which he and his wife were living. The Department has not put his claim form in evidence. I do not know whether at that time the Claimant was asked to complete a form CP2 (SEP), which relates to the situation where a claimant contends that he is living separately from a spouse or civil partner who is living in the same accommodation (see pages 19 to 25 of the bundle, which is the form which he signed in September 2014). It appears that an initial award of ESA was made, pending carrying out of the limited capability for work assessment, on the footing that he was single, with the result that the fact that his wife was working did not disentitle him to benefit. Following medical assessment the initial award of ESA was superseded on 9 February 2010 on the ground that the Claimant was found not to have limited capability for work, but on 15 December 2010 that decision was reversed on appeal to a First-tier Tribunal. Entitlement to income-

related ESA therefore continued, included assistance with the Claimant's mortgage interest.

24. The Claimant claimed and was awarded child tax credit from July 2013, again as a single person. He says that he did not claim that benefit earlier because he was not aware of the possibility of doing so.

25. In September 2013 the Claimant was moved from the work related activity group to the support group (although it appears (p.70) that the Claimant was put back into the work related activity group with effect from March 2015). I am not concerned in this decision to decide whether the Claimant had limited capability for work or work related activity.

26. The child benefit in respect of their son has throughout been paid to the Claimant.

27. By the end of 2013 the Claimant had built up substantial debts on credit cards and other unsecured loans, totalling some £50,000. His evidence is that these had arisen over the years primarily because he could not afford, out of his benefit income, to pay repair and maintenance costs, and other expenses, which it was necessary to incur in relation to the flat, and so had to borrow. By the end of 2013 he was, he says, unable to afford the interest which was payable on these credit card and other loans.

28. The only solution to his financial problem was to borrow additional money on the security of the flat, with which to repay the unsecured debts. However, as a benefit claimant he could not obtain an additional advance or remortgage. The only solution was for his wife to become a joint proprietor of the flat and to enter into the mortgage. Accordingly, in January 2014 he transferred the title to the flat to himself and his wife, and they remortgaged the flat for £101,000, the mortgage being a repayment mortgage. The additional sum of about £50,000 which remained after paying off the previous mortgage (on which around £50,000 was still owing) was used to pay off the unsecured debts. The effect was therefore that the Claimant's wife obtained, in January 2014, a beneficial half share in the flat, but became potentially liable to the mortgagee for the entirety of the mortgage debt. There is evidence in the papers suggesting (by reference to sold prices of other flats in the same block) that the flat was worth between £200,000 and £250,000 by about the end of 2014. Their intention was that the Claimant's wife would be responsible for repaying half the mortgage, and the interest payments on the other half would continue to be paid by the Department by way of ESA housing costs.

29. In order to continue obtaining payment by the Department of mortgage interest on the Claimant's half, it was necessary to inform them of the remortgage. The Department then made further enquiries as to the circumstances in which the Claimant and his wife were living. He was interviewed on 27 September 2014, and following the interview signed the CP2 (SEP) Form, which was (as I understand it) completed by the interviewing officer on the basis of his answers. On 7 October 2014 the Department made the decision which was under appeal to the First-tier Tribunal. The operative part of that decision (p.30) appears to be the following:

> "I have decided that [the Claimant] and [his wife] are to be viewed as LTAHAW [living together as husband and wife] from the date of the compliance interview (27/09/14) as this is the date that the relevant information has been provided from the Claimant."

30. The reference to "LTAHAW" was on any view not strictly correct, as that is the test for determining whether two persons who are not married are a "couple". However, the intended reference was clearly to the Claimant and his wife being members of the same household. None of the boxes on the printed decision form, intended to indicate the nature of the decision (e.g. "revised", "superseded" etc) were ticked. On one view there was no 'outcome' decision against which the Claimant could appeal, but merely a preliminary finding that they were members of the same household. However, the decision has been treated as one superseding and removing the Claimant's entitlement to income-related ESA with effect from 27 September 2014, on the ground that the transfer of the beneficial interest and the remortgage amounted to a change of circumstances, and the Claimant and his wife had ceased to live as members of separate households. I also treat the decision as having had that effect.

31. The decision was not altered on mandatory reconsideration. One of the factors relied on in the mandatory reconsideration decision was that in July 2013 they had made a joint claim for child tax credit. As I have noted above, that was not the case. The claim was by the Claimant as a single person.

32. As I understand it the Claimant has still been entitled, since the supersession decision, to contribution-based ESA, subject to the limitation (for those not in the support group) to 365 days' continuous entitlement. However, contribution-based ESA would not entitle him to payment of any mortgage interest by way of housing costs.

33. The Claimant's appeal against the supersession decision of 7 October 2014 was dismissed by the First-tier Tribunal, following a hearing at which he appeared and gave evidence at length, as is evident from the lengthy Record of Proceedings.

The Claimant's evidence as to the domestic circumstances

34. The issue which I have to decide is whether, as at around September 2014, the Claimant and his wife were "members of the same household." Their son was aged 9½ by that time. On the Claimant's evidence their domestic circumstances remained more or less the same from the time of what he contends to have been their separation in August 2009 down to September 2014. The only possibly significant change during that time, on his evidence, was the remortgage in January 2014.

35. The Claimant's evidence is set out in detail in the Record of Proceedings made by the chairman of the FTT, and in the oral evidence which he gave to me. In effect I completely reheard his evidence. There is also evidence from him in various documents in the bundle of papers. The following account sets out the effect of his evidence. I emphasise that, so far as financial matters are concerned, the following

account relates to the position prior to the reduction in the Claimant's income caused by the decision removing his award of income-based ESA.

36. Some time after the Claimant and his wife ceased to sleep in the same room the Claimant arranged for the construction of a partition in the L shaped living room so as to create in effect a separate bedroom, with a door in the partition. I had understood the Claimant's evidence to be that their son was moved into that newly created room, and that the Claimant sleeps in what was formerly the son's bedroom. However, I now see that the writing on the back of the photographs which the Claimant showed me at the hearing and has since sent to me appears to indicate that the separate room which was formerly part of the lounge is in fact his own room. I do not think that it matters which is the case. As I understand it, in order to get to the newly created bedroom it is necessary to go through the lounge.

37. The Claimant does his own cooking and, if his wife is around, takes his meals to his room and eats them there. He also washes his own clothes. He buys his own food and the food for his son, and stores it separately (whether in a cupboard or in the fridge) from where his wife stores her food, which she buys. The Claimant accepted that his wife will buy some of the son's food. They each have their own cleaning and washing up materials in the kitchen, and their own cleaning materials in the bathroom. I was even shown a photograph of separate toilet rolls in the bathroom.

38. The Claimant and his wife do not spend any time together, whether in the flat or outside it. If the Claimant's wife is with their son in the kitchen or the living room, the Claimant will go to his room. He has his own television in his room. He does not ever sit with his wife and son in the living room, whether watching television or otherwise. He would only sit in the living room if his wife was not around. The only time when he and his wife have any conversation is if something needs to be discussed in relation to their son.

39. They no longer have friends round to see them, and socialise separately outside the home. If his wife has a friend to the flat, the Claimant will either leave the flat or go to his room. If the Claimant has a friend round, he will take the friend to his room if his wife is around, but he has few friends.

40. After the separation the Claimant told his wife that he would be fully responsible for supervising their son's education, and so it has been. He takes his son to and collects him from school, attends events such as parents' evenings, and communicates with the school where necessary. He supervises his son's homework. The Claimant's wife goes along with his wishes in relation to education, but not other things.

41. Since the separation the Claimant and his wife, who continue to have separate bank accounts, have each paid half of all bills for items of expenditure which are necessarily common and unapportionable, such as energy bills, water and council tax. Food has been bought as described above. Each has bought their own clothes. The Claimant's wife buys the son's clothes. Prior to the remortgage mortgage interest in respect of the mortgage debt was paid by the Department by

way of ESA housing costs. After the remortgage the Claimant's wife paid her half share of the mortgage repayments, (and since the supersession decision in October 2014 has had to pay the entirety of the repayments in order to prevent the mortgage falling into arrears). The Claimant's wife paid the expenses of taking their son on trips, owing to the Claimant's health condition and tight budget. If anything went wrong with the house, they paid half each.

42. A typical weekday, when his wife is working, would be as follows. His wife gets their son up and gives him breakfast. She then leaves for work at around 8 a.m. The Claimant stays in his own room until she has gone. He then takes their son to school by bus and comes home. He collects their son from school and gives him a meal when they get back. He helps the son with his homework in the son's room. The son sometimes watches TV in the lounge, and sometimes with the Claimant in the Claimant's room. Sometimes the Claimant's wife is out in the evenings with her parents, who have a flat in the same block. Their son does not have friends round to play, and if he goes to a party elsewhere, the Claimant takes him. The son goes to bed between 7 and 8.30. If the son is ill or wakes up at night, sometimes he goes to the Claimant's wife and sometimes to the Claimant. They share responsibility if he's ill.

43. At weekends the same separation of living arrangements occurs. Sometimes the Claimant's wife does the son's meal and sometimes the Claimant does. The Claimant always eats his meals in his own room, unless his wife is not around. He explains this to his son by always finding an excuse based on his health problems for eating alone in his room. The Claimant's wife sometimes takes the son out to a restaurant.

44. The Claimant has not gone to live elsewhere because his son has a sensitive nature and would be devastated if his parents were to split up, and in any event he could not afford to rent a one bedroom or studio flat, which would cost about £1200 per month. The Claimant and his wife stay in the same property for the sake of their son. They agreed to support him together until his education is done. They agree that the impact on the son of them separating would be "huge". In the CP2(SEP) Form, signed in 2014, the Claimant said (p.24): "We're not sure if we'll reconcile or get divorced.…….try not so show our son we're separated." In a letter dated 29 June 2015 (p.47) the Claimant said: "My ex-partner and I understand that we can still live at the same place to take care of the child. I could move with my son and claim housing benefit and have my income from the DWP but my child's happiness and his life is more important than money." The Claimant showed me evidence of their son's attainment levels indicating that the Claimant and his wife have succeeded in ensuring that his progress at school is not affected by the 'separation'.

Findings of fact in relation to the domestic circumstances

45. Subject to the following points, I accept the Claimant's evidence as summarised in paras. 34 to 44 above.

46. However, in my judgment the degree of interaction between the Claimant and his wife is unlikely to be as limited as the Claimant would have it appear. In my judgment there is likely to be a considerable amount of interaction between them,

particularly in relation to the needs and activities of their son. I do not accept that there are only rare occasions when the Claimant and his wife will be together in the kitchen or living room. My reasons are as follows.

47. First, the Claimant did in his evidence accept that they have discussions in relation to their son, when the need arises. There are in my view likely to be a considerable number of occasions when their son's activities, health, education, needs and desires merit joint discussion and decision making, given that they are both equally concerned for his welfare. (The Claimant's wife confirmed, in a signed statement dated 23 March 2015 in support of the appeal, that "we have a child and share responsibility in bringing him up both emotionally and financially."). I do not accept that an intelligent and educated woman, such as the Claimant's wife clearly is, would be willing to delegate responsibility for supervising his education to the extent which the Claimant claims.

48. Secondly, the Claimant's evidence is that his son would be mortified if he thought that they were separating, and that they stay together for his sake. That being the case, I do not accept that, in reality, the Claimant and his wife would physically separate their lives in the flat to the extent which the Claimant claims. It seems to me that their son would be bound to be upset if the three of them did not spend at least some significant time together in the living room and at meal times. The Claimant's answer to that was that their son has in effect never known anything different, as he cannot remember what things were like before the 'separation' in September 2009 (when he was only 4½). Even taking that point into account, it seems to me that their son would necessarily, by the age of 9, have acquired a sufficient understanding, from visiting friends, conversations at school, and watching television, of what is involved in normal family life, for it to be impossible for him not to regard as very strange a degree of living apart which is anything like as great as the Claimant portrays.

49. Thirdly, there would appear to be no possible reason whey they would separate their lives to such an apparently artificial extent. The evidence is that they are able to get along sufficiently well to have sensible discussions in relation to their son. They are able to tolerate each other's presence in very confined accommodation. They were able to agree on the remortgage arrangements in 2014. The Claimant's wife has cooperated in signing a brief statement in support of this appeal. It would be natural for their son to want and need them both to be in the same room together on repeated occasions, and I cannot see why they would refuse. I cannot see why, for example, the Claimant would refuse to eat a meal with them, or at least be present in the room when his wife and the son were eating, if the son wished it, which it seems to me he would be bound on occasions to do. The only reason for refusing might be in order to preserve, for social security benefit reasons, a situation whereby there are separate households. However, I do not accept that in reality that reason alone would cause them to act differently than they would otherwise be inclined to do.

One household or two?: conclusion

50. In my judgment, on my findings of fact, this was at the material time one household, and not two separate households, for the following reasons.

51. First, as I have found, there is a considerable amount of interaction between the Claimant and his wife, and some time spent together in the flat, arising out of the activities of their son and their desire not to give the impression to him that they are separated. Some of these interactions relate to what might be described as the domestic routine of the household, and in particular their son's meals, homework, play etc.

52. Secondly, there was (prior to the decision in October 2014) some degree of pooling of their income and expenditure when it came to costs in relation to their son. They do not appear to have agreed any fixed proportions in which they would bear expenditure relating specifically to their son. The Claimant paid for some food, but so also did his wife. The Claimant's wife tended to buy the son's clothes and to pay for trips. It seems likely, given her substantially greater income, that she was able to and did pay for more of the expenses in relation to their son than did the Claimant.

53. It may be objected that the degree of interaction and cooperation is in substance no greater than might be the case if the Claimant and his wife were living in entirely separate accommodation. There would still need to be discussions between them in relation to their son, and a greater share of expenses in relation to the son might be paid by one of them than the other. However, if husband and wife are living in entirely separate accommodation, it is easy to identify separate households, as no domestic routine or life will be shared. There is, on my findings, a significant degree of sharing in the present case.

54. In my judgment it would be unrealistic to regard the Claimant's son as simultaneously a member of two households, as he would be if they were living in separate accommodation and he spent part of the week living with one of them and part with the other. I think that in the circumstances it is more in accordance with common sense and reality to say that there is only one household, comprising the Claimant, his wife and their son.

The First-tier Tribunal's decision

55. The First-tier Tribunal, having reserved its decision until 5 days after the hearing, set out its reasons in the Decision Notice itself. The reasons are relatively brief. As regards the common household issue, its reasoning is encapsulated in the following:

> "I find that they are living in the same household. It is a 2 bedroom flat. [The Claimant's wife] sleeps in one bedroom and the son in the other. [He] sleeps in a part of the lounge. Otherwise, all rooms (not her bedroom) and facilities are shared. Since January 2014, the mortgage is in joint name but in reality, [she] is the only one contributing to it at present. Some bills are in [his] name and some are joint. They both take an interest in and share the upbringing of their child whom they try to shelter from the estrangement. She is not in the household because she is [his] carer, she is there because it is her home that she shares with him: albeit that they no longer get on and consider themselves "ex" partners.

> I accept that they are estranged (and have been so since 2009) in as much as they do not sleep , eat or socialise outside the house together etc and that she does not buy his food, but the test is whether they share the same household: that is a domestic establishment containing the essentials of home life. They clearly share the premises of [the flat] as their home. They have a particular tie in their joint concern for their son and in the intermingling of their financial affairs (although I appreciate that [he] entered into the joint mortgage only because he needed to release funds to pay off other debts). Because they share the same household, [he] cannot claim ESA as a single person."

56. In my judgment the First-tier Tribunal's decision was wrong in law in that the Tribunal did not in all the circumstances, and in particular the very detailed oral evidence which it had taken from the Claimant, make sufficiently detailed and precise findings as to the way in which they conducted their lives in the flat, in terms of domestic routine. In addition, the Tribunal did not make clear whether it accepted the Claimant's evidence in its entirety, or whether it was finding that (as Mr Cooper submitted to me, and I have accepted) he had in some respects exaggerated the degree of separation. The First-tier Tribunal's decision must for those reasons be set aside as wrong in law. But it is nevertheless apparent that the First-tier Tribunal did attach considerable significance, as I have done, to the fact that (in the Tribunal's words) they "both take an interest in and share the upbringing of their child whom they try to shelter from the estrangement."

Is there a ground for supersession?

57. The Secretary of State is not entitled to change a decision awarding benefit simply because it now thinks that it was wrong, but must establish a ground for supersession or revision of the decision. The First-tier Tribunal said that arguably the decision to accept Mr A as a single claimant in 2010 was wrong, but that it accepted the submission of the Secretary of State's representative that the entering into the joint mortgage in January 2014 was a change of circumstances which provided a ground for supersession. However, the Tribunal then went on to say that "the DWP have treated the effective supersession date of 27 September 2014 as the date that relevant information was provided by [the Claimant] at interview and I confirm this."

58. In my judgment, however, the transfer of a half share in the equity of the flat to the Claimant's wife, and the entry by her into the joint mortgage, in January 2014 did not constitute a change of circumstances which itself justified the Secretary of State in superseding the original decision awarding income-related ESA. In my judgment those facts would have made no difference, had the correct analysis down to January 2014 been that there were two separate households. The Claimant contends that he made full disclosure to the Secretary of State when income-related ESA was originally awarded, and that (apart from the remortgage) nothing has changed since.

59. That, however, raises the question whether there is some other ground for revision or supersession, namely mistake of or ignorance as to material fact. That is a ground for revision under reg. 3(5)(b)of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 if the mistake or ignorance was on the

part of a decision maker, and a ground for supersession under reg. 6(2)(c)(i) if the mistake or ignorance was on the part of a First-tier Tribunal. The burden of establishing a ground for supersession lies on the Secretary of State. Further, the mistake or ignorance must be as to primary fact, and not as to an inference or conclusion of fact (R(I) 3/75). An alternative possibility is that there was an 'official error' by the decision maker at the time of originally awarding income-related benefit. That might have been so if, for example, the living arrangements were not properly investigated. Official error by a decision maker is a ground for revision under reg. 3(5)(a).

60. It is not clear whether the decision which needs to be revised or superseded is that of the FTT on appeal on 15 December 2010 (see para. 23 above). If it was, then it would seem that that FTT must have been in ignorance as to material fact, because it will not have investigated the domestic household issue at all, because the appeal to it was in relation to the issue whether the Claimant had limited capability for work.

61. If the decision which needs to be revised or superseded is the original decision maker's decision which was in effect reinstated by the FTT on 15 December 2010, there is a complete absence of information before me, because the Secretary of State has not disclosed what inquiries it made, or what evidence it received, in relation to common household at the time of the original decision awarding income-related ESA. On that footing, the Secretary of State has not yet satisfied the burden of establishing a ground for revision or supersession.

62. **With a view to enabling me to decide whether there was a ground for revision or supersession of the decision originally awarding income-related ESA, and from what date it operated, I DIRECT as follows:**

> **(1) The Secretary of State shall, within one month from the date of issue of this decision, make a further submission on the issue of revision/supersession, taking into account my above findings. The submission must attach all available evidence as to the information sought and received by the Secretary of State at the time of the original decision in 2009 or 2010 awarding income-related ESA.**
>
> **(2) The Claimant may reply to that submission in writing within one month of the date when it is sent to him by the Upper Tribunal.**

Charles Turnbull
Judge of the Upper Tribunal
31 May 2016