DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Maidenhead First-tier Tribunal dated 11 December 2015 under file reference SC301/15/00579 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Local Authority's decision dated 26 April 2013 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge previously involved in considering this appeal on 11 December 2015.

(3) **The File should be referred to a District Tribunal Judge with a view to appropriate listing directions for the fresh hearing (e.g. at Rugby with a video-link facility for the local authority Respondent).**

(4) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary and what happens next

1. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal ("the Tribunal") involves an error on a point of law. For that reason I set aside the Tribunal's decision. The local authority's representative is in agreement on that course of action, but I give brief reasons for the benefit of the Tribunal.

2. The case now needs to be reheard by a new First-tier Tribunal. I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new Tribunal will succeed *on the facts*.

3. So the new Tribunal may reach the same, or a different, decision to that of the previous tribunal. It all depends on the findings of fact that the new Tribunal makes on the matters in issue.

The background to this appeal to the Upper Tribunal

4. The local authority decided that the Appellant had been overpaid housing benefit (HB) because her partner's earnings had not been included in the relevant calculations. The local authority also considered that the Appellant could reasonably have known that she was being overpaid. On 11 December 2015 the Tribunal decided to go ahead in the absence of the Appellant and confirmed the local authority's decision, so dismissing her appeal. The Appellant then appealed to the Upper Tribunal.

The proceedings before the Upper Tribunal

5. Mr Andy Malik, the Appellant's representative (who was not involved at the original Tribunal stage), argued in short that the Tribunal should have considered of its own initiative whether to adjourn the hearing and should have done so. I gave permission to appeal. In doing so, I made the following further observations:

> "4. On that note, there is a further point to those raised by Mr Malik which strikes me as justifying a grant of permission to appeal in itself, namely an apparent failure to have regard to where the claimant lived. When the claimant lodged her Housing Benefit appeal, she was living in Slough. The respondent, obviously, was Slough BC. On 10 September 2015 the file was referred to a Judge, the clerk noting this is a "complex overpayment appeal". On 24 September 2015 Judge Roberts gave directions for the matter to be listed at Maidenhead with a (longer than usual) 90 minute time estimate (p.203). On 20 October 2015 a hearing notice was sent out to the claimant at her Slough address, notifying the hearing at 10 am in Maidenhead on 11 December 2015.
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> 5. On 19 October 2015, i.e. the day before that notice was sent, the claimant wrote notifying her change of address to Rugby (letter received 22 October 2015). On 25 October 2015 the claimant (who must presumably have had a postal redirection in place) wrote from her Rugby address saying the date was inconvenient for childcare reasons and due to her husband's work commitments (p.204).
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> 6. On 27 October 2015 a registrar refused the postponement request, arguing that e.g. there was plenty of time to have sorted out childcare issues (p.205). The claimant sent in a further submission (pp.207-208) but did not in terms then ask for an adjournment. However, she indicated in a further letter that she would

prefer to have attended (see p.212). The Tribunal plainly considered whether it was right to go ahead and decided it was (see RoP at pp.213-214 and decision notice at p.218, also the reasons at para 2 (p.221)).

7. However, neither the registrar nor the Tribunal seemed to have given any thought at all – at least, there is no hint they did – to one crucial factor. When the claimant appealed, her home address was (according to the web-based AA route planner) 7 miles and 18 minutes by car from the Tribunal venue. By the time she had moved to the Midlands, she lived 84 miles away in a journey time that the AA estimates at 1 hour 40 minutes by car – and we do not know whether the claimant (a) can drive and (b) has access to a car. The journey would be much, much longer by public transport. Furthermore, arranging childcare for a 10 am hearing in Maidenhead is one thing when you live in Slough, 7 miles from the venue, but quite another matter when you live in Rugby.

8. There is one further rather puzzling matter. I have had the Tribunal's database GAPS2 checked. This has a red flag on the front page for this file reference which states "appellant change of address but appeal needs to stay at Maidenhead venue as it's a housing benefit appeal." The basis for this record is unclear to me. When DTJ Roberts very sensibly directed the case be heard at Maidenhead the tribunal file showed that the claimant lived in Slough. It is the appellant's appeal, not the council's appeal. The convention is the appeal is usually heard where the claimant is. The council is in a better position to send a representative to another venue – or it can always ask for a video-link hearing. None of these issues were apparently considered by the registrar or the Tribunal on the day. On that basis it seems to me at the very least arguable the Tribunal erred in law."

6. The local authority's representative, very fairly, is content that the appeal be allowed and the matter is remitted (or sent back) for re-hearing to a new Tribunal. In particular, "the Council agrees that the appellant did not receive a fair hearing; in particular, the Tribunal could not properly determine whether the appellant could reasonably have been expected to know that she was being overpaid without hearing from her and questioning her about her understanding of the information available to her in HB decision notices".

7. The Appellant is also content that the appeal be allowed with a fresh hearing before a local Tribunal. I formally find that the Tribunal's decision involves an error of law in that the Tribunal failed to have regard to the appellant's place of residence in deciding on listing arrangements and whether or not to proceed in her absence. If it did have regard to where she lived – and there is no evidence this factor was addressed – the Tribunal failed to give adequate reasons for its decision to proceed in her absence.

What happens next: the new First-tier Tribunal

8. There will need to be a fresh hearing of the appeal before a new Tribunal. Although I am setting aside the Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant is liable to repay any overpayment of housing benefit. That is all a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact, applying the relevant law.

9. The District Tribunal Judge should make appropriate listing arrangements, e.g. for the hearing to take place in or near to Rugby with a video-link facility for the local authority's representative if s/he is unable to attend the hearing in person.

10. The new Tribunal will, of course, bear in mind that the test under regulation 100 is subjective: see further Upper Tribunal Judge Mark's decision in *JS v Hull CC* [2012] UKUT 477 (AAC) (at paragraph [16]).

Conclusion

11. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 18 July 2016

Nicholas Wikeley
Judge of the Upper Tribunal