SL v SSWP (IS) and SL v Carlisle City Council (HB)
[2017] UKUT 64 (AAC)

IN THE UPPER TRIBUNAL **Appeal Nos.** CIS/2900/2016 and CH/2899/2016
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name: SL
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC924/11/000625 (CIS/2900/2016) & SC924/11/00599 (CH/2899/2016)
Tribunal Venue: Durham
Hearing Date: 18 July 2016

NOTICE OF DETERMINATION OF AN APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal in respect of both applications.

I have explained the reasons for refusal at greater length than would normally be the case through courtesy to the appellant's representative.
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REASONS

1 The applications seek to permission to appeal against refusals by the F-tT to set aside the decisions in SC924/11/000625 & SC924/11/00599. These were two decisions relating to income support and council tax benefit ('the substantive decisions') for which I refused the appellant permission to appeal under UT case references CIS/3204/2015 and CH/3203/2015. The long and short of the matter was that the careful and closely typed and argued analysis by the F-tT in the substantive decisions did not disclose any arguable, material error of law. It dealt exhaustively with, amongst other things, the voluminous evidence in the case, as well as dealing with a number of legal submissions regarding the legality of the surveillance evidence, the arrest of the appellant and her ex-husband and the search of their house.

2 Over a year after the F-tT gave its substantive decisions and following my refusal of permission to appeal, the appellant unsuccessfully sought to set aside the F-tT decisions. The appellant now seeks permission to appeal against that decision.

3 In order to succeed, the appellant must show that there was an arguable error in the F-tT's refusal to set the decisions aside.

The conditions for setting aside a decision

4 These are set out in rule 37 of the Tribunal Rules (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ('the First-Tier Tribunal Rules'). It permits decisions

of the F-tT to be set aside in limited circumstances:

> '**37 Setting aside a decision which disposes of proceedings**
>
> (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.
>
> (3) …, a party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Upper Tribunal so that it is received no later than 1 month after the date on which the Tribunal sent notice of the decision to the party.'

The F-tT's reasons for refusing to set the decision aside and the further reasons in refusing permission to appeal

5 The refusal to set aside reads (in full):

> 'The appellant's representative argues that there has been a procedural irregularity in relation to video footage which was not shown to the tribunal but has subsequently been see by [the appellant] and involves an evening which she spent bowling with her ex-husband […]. It is argued that as the tribunal did not see this video and know that the footage was taken as part of ongoing surveillance exercise, the tribunal has 'erred' in its decision making. There is a statement (unsigned) sent in from the appellant's daughter. The tribunal have read this.
>
> There is also a repeated allegation that the footage of the appellant's home, which was viewed by the tribunal, has been altered. This is a serious allegation. The tribunal addressed this in its 'main' statement of reasons … for example at paragraphs 34 and 39d. It is noted that the appellant has not challenged the evidence in any other legal

venue.[1]

As is set out in the main statement of reasons the tribunal had an enormous amount of evidence which pointed to the appellant and [her ex-husband] living together as husband and wife'. An isolated incident in a bowling alley would not have affected the decisions. Nor would the other points made in the request for set aside. The decisions in the First-tier Tribunal have been upheld in the Upper Tribunal.'

6 The refusal of permission to appeal (as necessary for the applications before me):

'As has been set out in the recent Decision Notices of 18/7/16 and 18/8/16 (the latter made following receipt of a letter from the Secretary of State for Work and Pensions) the tribunal had an enormous amount of evidence which pointed to the appellant and [her ex-husband] living together as 'husband and wife'. An isolated evening at the bowling alley and associated findings would not have affected the decisions. There were numerous other findings of fact regarding [the appellant's] credibility.

In addition, the tribunal simply do not accept that the video evidence of the arrest was tampered with. The tribunal preferred the evidence of several long-serving enforcement officers to that of the appellant who has several convictions for dishonesty'[2]

The submissions on errors of law

7 The errors that the appellant's representative puts forward are that

(i) the refusal to set aside was in breach of natural justice,
(ii) it failed to adequately explain the decision and
(iii) failed to take account of matters that should have been taken into account.

8 The essence of the representative's arguments on are that (i) the video footage of the bowling party incident taken during surveillance was not presented to the tribunal. It is argued that had the tribunal called for the video footage, they would have seen that the appellant was telling the truth when she gave evidence that the event was a birthday party for her young grandson at which he was present. Had this been known, it might have changed the view the tribunal took of her credibility.

9 In addition, they argued that the judge's comments on the bowling incident showed a significant misunderstanding of the way the surveillance was undertaken; and (ii) as regards footage relating to the appellant and her ex-husband's arrest, the F-tT

[1] The F-tT had evidence before it that the appellant pleaded guilty to benefit fraud offences in relation to the facts upon which the substantive decisions were based. Although she says that 'the case did not go ahead', that is not so. She was sentenced to 6 months' imprisonment, suspended for 12 months for two offences, and was required to pay over £10,807 under s Proceeds of Crime order (p395).
[2] The papers in the bundle show convictions on 7 counts of fraud in relation to a non-social security matter.

misunderstood the appellant's submission. The F-tT was wrong in thinking that the appellant was alleging that the police or DWP had tampered with the evidence. They also submit that the F-tT behaved unfairly by failing to give the appellant sufficient time to digest the footage of the arrest which they had not seen until the day of the hearing.

10 I consider all of these arguments to be untenable for a variety of reasons.

The bowling party incident

11 The only way there could have been a procedural error was if the F-tT had failed to call for the video evidence when it should have done. I cannot see that this is arguable. If it was, it is devoid of merit.

12 The surveillance log is at (p97 – 114) with the details of the surveillance at the bowling alley at pp 111 – 113). The log shows that the video footage focussed on the appellant and her ex-husband with another couple who join them. In the Record of Proceedings, the entire incident at the bowling alley is covered in 7 lines of evidence in the Record of Proceedings.

13 Neither the appellant's representative nor the appellant (whose correspondence shows her to be very actively engaged in the management of her case) raised the issue of the 'missing' footage at the hearing, and it played no part in the representative's closing submissions. Having taken numerous procedural points throughout the hearing (including points on PACE, RIPA, DWP guidelines on arrests, and possible corrupt action by the police), it is to be expected that the representative would have taken this point if he thought there was any mileage in it.

14 The appellant's representative seeks to argue that the failure to call for the video tainted the F-tT's finding that the appellant was not a credible witness. The Statement of Reasons does show that the judge thought it unlikely that the birthday boy, a child of 7, would be kept up so late (paragraph 40(b)), but I am *not* satisfied that that that single erroneous finding of fact relating to one example of one occasion, and which no-one considered to be sufficiently important even to comment on at the time or in closing submissions, could be seen either to require the F-tT to adjourn on its own initiative to call for further video evidence or to have tainted the tribunal's findings. The latter, of course, was not a procedural error itself. It might have been a risk attaching to such a procedural error, but that risk never materialised. This is clear from the decision as a whole.

15 The presence or absence of the child was not the reason the incident was explored. The point of this part of the surveillance was to show another example of the appellant and her ex-husband socialising in a public place, just as they said they did every Friday night at the pub [40a,] or on their visits to antiques fairs together and on holidays. It was

just one of a very large number of items, the preponderance of which pointed strongly towards the appellant and her ex-husband being a couple. I agree with the F-tT, as recited above, that it was insignificant when seen in relation to the rest of the evidence. Indeed, in my view a rational tribunal could not have come to any other conclusion about the status of a couple.

16 It would also be wrong characterise the omission to adjourn of its own initiative as a failure by the tribunal in these circumstances. The failure (if there was one, which I do not accept) was by the Secretary of State. Although he has a duty to present all relevant evidence, his breach of that duty does not translate automatically into a breach of duty by the F-tT: *FN v Secretary of State for Work and Pensions* [2015] UKUT 670 (AAC), a decision of a Three Judge Panel. It is necessary to show an error by the tribunal itself. In the circumstances set out above, such an error was strikingly absent.

17 I am also at a loss to see how it is possible for the representative to argue that the F-tT had fallen into error in its understanding of the surveillance carried out in this case or how that could amount to a procedural error.

18 The F-tT was fully aware of the scope of surveillance in the case, the former representative having complained about it over the course of the two day hearing. The particular circumstances surrounding the presence of the two officers at the bowling alley (rather than one) had been explained at the hearing and *and* in the papers (p111). The F-tT was entitled to accept the explanation. Its comment about coincidence is no more than an infelicitously expressed remark.

19 Had the F-tT's understanding been wrong (which it was not) there might been a factual error - or a legal error if the effect of the factual error was seriously prejudicial - but it would not be a procedural error within the sense of rule 37.

20 Even if there had been a procedural error, I cannot see that any rational tribunal could take the view that it would be in the interests of justice to set aside the decision under rule 37(1). That would be disproportionate to the relevance of the information that might have been obtained. That alone would be sufficient reason for not exercising the discretion to set aside the decision having regard to the overriding objective in rule 2 of the Tribunal Rules (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ('the First-Tier Tribunal Rules').

21 I shall deal with the adequacy of reasons together at the end.

The video footage of the arrest

22 The points that the appellant's current representative now makes are that (i) the F-tT

made some mistake about what they were trying to argue before the tribunal, i.e. that the appellant's representative did *not* submit that the evidence was tampered with; and (ii) the appellant did not have time to digest the evidence.

23 The first point to make is this: an assertion about a mistake about the meaning of a submission could suggest that the tribunal made a factual error, but questions of fact are for the F-tT. It had to decide whether it believed that the evidence was tampered with or not and concluded, with sufficient reason, that it was not. A finding of fact may be wrong but it is not remediable unless it can also be seen as prejudicial enough to constitute a legal error. Either of these are not, however, a procedural error. They have nothing to do with procedural irregularity.

24 The second point is that it is plain from the Record of Proceedings that the previous representative *did* argue that the evidence was tampered with. Indeed, he argued that they were **'unsure of veracity of footage (p631)…Possibly doctored footage (p632)'** and **'in context there is the possibility of corruption.'**

25 The third point, that the appellant did not have time to digest the evidence, ignores the evidence given at the hearing and submissions made by the representative on this matter. These are in the Record of Proceedings. I have no reason to doubt its accuracy.

26 The appellant acknowledged several times at the hearing that she had seen parts of the video during the criminal proceedings. She commented frequently on the video as it was played, and the tribunal adjourned shortly after the video finished (around 3:45 pm), which gave the parties time to consider their positions. They also had a full opportunity the next day to make representations, and both the the appellant and representative took advantage of this.

27 In these circumstances, a procedural error by failing to give the appellant the time to digest the video is untenable.

The adequacy of the reasons given in the refusal to set aside under rule 37.

28 The reasons given by the F-tT in the refusal to set aside and the refusal of permission to appeal are adequate having regard to the rule 34(2) of the First Tier Tribunal Rules and common law expectations on providing reasons.

29 Rule 34(2) of the First Tier Tribunal Rules expressly excepts Part 4 decisions (which includes rule 37) from the power a tribunal otherwise has to give reasons: The tribunal -

> *'may* give reasons for a decision which disposes of proceedings (*except a decision under Part 4*) either

(a) orally at a hearing or
(b) in a written Statement of Reasons sent to each party.'

30 Judges make a great many case management and intermediate stage decisions on a regular basis. The nature and number of the decisions to be made, the need for simplicity and informality at case management and intermediate stages, and the avoidance of premature, protracted and costly arguments over matters which should be dealt with on appeal all indicate that a robust approach to decision making is appropriate (*The Antaios* [1984] 3 All ER 229 at 237). The level of detail and reasoning required in these types of decision are therefore likely to be of a lesser order. A level of compromise can be seen not only in the approach taken to Part 4 decisions, but also in the overriding objective in rule 2 of all Tribunal Procedure Rules. The letter requires cases to be dealt with not only justly and fairly but also proportionately.

31 *Abraham v London Borough of Ealing* [2012] UKUT 437 (AAC) explains that the need to give reasons and the extent (or adequacy) of those reasons varies with the context in which reasons were sought. In *Abraham* my view was that the exception in rule 34(2) and the expectations of common law were reconcilable when common law expectations were gauged in light of the Rules authorised under the Tribunals, Courts and Enforcement Act 2007. The touch of common law should be light where the Rules permit no reasons to be given.

32 In my view, the appropriate compromise between the rule and common law is found in the test in *R (Birmingham City Council) v Birmingham Crown Court* [2009] EWHC 3329 Admin [46] – [50], per Beatson J***: it is sufficient to give a succinct explanation of a case management or intermediate decisions made before final disposition of a case where the reason is not otherwise plain from the circumstances, or where the decision would appear aberrant in the absence of some explanation*****.**

33 Applying that to rule 37 cases, there will be a great many cases in which it will be obvious why a particular decision was made: *Abraham v London Borough of Ealing* at [40]

> 40. '…In practice, if it is obvious from the nature of the decision being made (as it often is in relation to setting aside under rule 37(2)(c), …) nothing more than a finding of the relevant circumstance that applies may be needed. It will generally be obvious that a party who has not been able to attend a hearing for a legitimate reason will have lost his opportunity to put his case, test the evidence of the other party and make his submissions to the judge. That party will, at least on the face of it, not have had a fair hearing. In a great many of these cases, the interests of justice will favour setting the decision aside. In cases under rule 37(2)(a) and (b) (missing documents) and 37(2)(d) (unspecified procedural irregularity, it may be sufficient for the judge to highlight the materiality (or lack of it) of the document or asserted procedural irregularity to the

decision making process. The reasons may not need to do more than say so briefly, as long as they make the material point.

34 In the application before me, the decision notice on setting aside

(i) (a) identifies the missing item of evidence as the video of the bowling incident;
(b) summarises the representative's argument on its significant to the appellant's case; and
(c) explains that there was a wealth of other evidence that satisfactorily established the Secretary of State's case so that the bowling incident video would not have made a difference; and

(ii) addresses the repetition of the allegation of tampering with the evidence that was resoundingly rejected before.

It is very difficult to see what else needed to be said.

The submission of late evidence

35 I have taken the view that the appellant's representative wishes me to rule on whether late evidence in the form of the bowling incident video should be admitted. It follows from what I have said above that it could not possibly make a difference and should not lead to the reopening of the case.

(Signed on original)

S M Lane
Judge of the Upper Tribunal
(Dated) **09 February 2017**