[2025] UKUT 200 (AAC)
Appeal No. UA-2023-001581-ESA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

The Secretary of State for Work and Pensions

Appellant

- v -

IL

Respondent

Before: Upper Tribunal Judge Butler
Hearing date: 17 March 2025
Mode of hearing: CVP Video

Representation:
Appellant: Mr J. Lewis (counsel), instructed by Government Legal Department
Respondent: Ms N. D.

On appeal from:
Tribunal: The First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: 1651-1450-8074-3928
Tribunal Venue: Sutton
Decision Date: 28 April 2023

SUMMARY OF DECISION

EMPLOYMENT AND SUPPORT ALLOWANCE (40); RECOVERY OF OVERPAYMENTS (27).

Judicial summary

This appeal is about the Secretary of State's ability to recover an overpayment of universal credit, new-style jobseekers' allowance or new-style employment and support allowance. Recovery of these is governed by section 71ZB(1)(a) to (c) of the Social Security Administration Act 1992.

The Upper Tribunal decided that section 71ZB(1)(a) to (c) of the Social Security Administration Act 1992 allows for universal credit, new-style employment and support allowance ("ESA") and new-style jobseeker's allowance ("JSA") overpayments to be recoverable, irrespective of how they have arisen. The Upper Tribunal followed the earlier decision of the Upper Tribunal in ***LP v SSWP [2018]*** UKUT 332 (AAC), which dealt with this issue in relation to universal credit overpayments. The Upper Tribunal

also followed the conclusion in ***LP*** that a claimant's right of appeal against decisions to recover overpayments of benefits covered by section 71ZB(1)(a) to (c) only extend to the size of the overpayment being recovered.

The High Court decision in ***R (o.a.o. K) v SSWP [2023]*** EWHC 233 (Admin) does not enable a First-tier Tribunal to decide that a benefit overpayment covered by section 71ZB(1)(a) to (c) is not recoverable where it arose due to the Secretary of State's actions or failures.

The above position is not changed by the decision by the European Court of Human Rights (ECtHR) in ***Čakarević v Croatia*** (Application 48921/13). The matters addressed in ***Čakarević*** are instead potentially relevant to a judicial review challenge against a decision by the Secretary of State not to waive recovery of an overpayment of universal credit, new-style JSA or new-style ESA.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal. The decision of the First-tier Tribunal in relation to appeal 1651-1450-8074-3928 involved an error of law.

Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set aside decision 1651-1450-8074-3928. I remake the decision as set out below.

1. The appeal is refused.

2. The Secretary of State's decision dated 30 December 2021 is confirmed.

3. The claimant has been overpaid £8,835.87 of new-style employment and support allowance for the period from 04.05.20 to 29.11.21 inclusive.

4. The overpayment in question was caused by the Respondent's failure to take into consideration the claimant's occupational pension entitlement, which the claimant had validly declared to the Secretary of State when he claimed new-style employment and support allowance.

5. The decision to pay the claimant new-style employment and support allowance has been validly revised under section 9 of the Social Security Act 1998.

6. Under section 71ZB(1)(c) and (3) of the Social Security Administration Act 1992, the overpayment is recoverable from the claimant.

REASONS FOR DECISION

Introduction

1. This appeal concerns section 71ZB of the Social Security Administration Act 1992 ("the 1992 Act"). Section 71ZB applies to the recovery of overpayments of the following benefits: universal credit ("UC"), new-style employment and support allowance ("NSESA") and new-style jobseekers' allowance ("NSJSA").

Factual background

2. Around 18 years ago, the claimant, IL, was diagnosed with multiple sclerosis, a progressive, debilitating, permanent medical condition. In around 2020, IL had to give up his work as a university lecturer, due to the progression of his medical condition. IL claimed NSESA on 27 April 2020. When claiming the benefit, IL listed in his claim form that he was receiving an occupational pension. At that time, the Department for Work and Pensions ("DWP"), which acts on behalf of the Secretary of State for Work and Pensions ("SSWP"), did not make any further enquiries in relation to IL's notification.

3. On 02 July 2020, DWP awarded IL NSESA, with his entitlement to the benefit starting on 04 May 2020. Later, on 13 October 2021, DWP wrote to IL asking for information about the pension he had declared when making his NSESA claim. IL provided this on 04 November 2021, including a copy of his payslip from the Universities Superannuation Scheme ("USS") showing the pension he was receiving.

4. On 30 November 2021, DWP decided that IL's USS pension payments needed to be taken into account when assessing his entitlement to NSESA from 04 May 2020 onwards. DWP decided that as a result of those payments, IL was not entitled to any NSESA between 04 May 2020 and 29 November 2021 inclusive. On 07 December 2021, DWP wrote a decision letter to IL, stating he was not entitled to NSESA.

5. On 30 December 2021, DWP decided IL had been overpaid £8,835.87 of NSESA for the period from 04 May 2020 to 29 November 2021 inclusive. DWP decided this overpayment was recoverable from him under section 71ZB(1)(c) of the Social Security Administration Act 1992 ("the 1992 Act").

6. IL appealed to the First-tier Tribunal on 04 May 2022. HM Courts and Tribunals registered two appeals for IL, although the substance of his challenge was actually against DWP's decision to recover the £8,835.87 of overpaid NSESA from him. IL argued that that DWP made a mistake paying him the NSESA and he would be caused difficulties by repaying the money (which had already been spent). IL also argued that receiving the NSESA had reduced his USS pension payments, because the overall increase in money had triggered a higher income tax liability.

The First-tier Tribunal's decisions

7. On 28 April 2023, a First-tier Tribunal Judge (the "**FTT**") decided IL's appeals. The FTT:

   (a) refused the appeal about DWP's entitlement decision. The FTT confirmed IL was not entitled to NSESA between 04 May 2020 and 29 November 2021 inclusive, on the basis of the occupational pension he was receiving during that period; and

   (b) allowed IL's appeal against DWP's overpayment decision. The FTT decided that although IL had been overpaid £8,835.87 of NSESA, this was not recoverable from him.

8. The FTT made its decision about the overpayment appeal on the basis that when determining an appeal, an FTT stands in the shoes of the Secretary of State and can make any decision that a DWP decision maker could make on behalf of the Secretary of State. The FTT's reasoning was that the Secretary of State should have considered the consequences on IL and his family of recovering the overpayment.

9. In its decision notice, the FTT stated that DWP's decision to recover the overpayment from IL to take into account:

   (a) his personal circumstances including his ill health and his wife's need to care for him,

   (b) the subsequent decision to pay a carer to help care for IL;

   (c) the fact IL and his wife had two young children at primary school;

   (d) the high level at which DWP was recovering the overpayment (£200 per month), which was being imposed despite the appeal process; and

   (e) the overall financial difficulties being caused to the family, with more and more corners needing to be cut.

10. The FTT decided that DWP had failed to consider the consequences of recovering the overpayment and doing so was an error of law, citing the High Court decision in ***R (o.a.o. K) v SSWP [2023] EWHC 233 (Admin)*** (hereafter referred to as "***R(K)***").

11. On 15 June 2023, the FTT provided a single Statement of Reasons for both decisions. In the Statement of Reasons, the FTT wrote that it decided there had been an overpayment but that the DWP could not recover it.

12 The FTT wrote that it was told that it did not have the jurisdiction to make such a decision as the decision whether or not to recover could only be made by DWP. The FTT wrote at paragraph 6 of the Statement of Reasons that it decided it did have that jurisdiction as it stood in the shoes of the DWP, which had already decided to make deductions from IL's ongoing benefit, causing him and his family considerable hardship.

13. At paragraph 7 of its Statement of Reasons, the FTT wrote that DWP had failed to provide evidence about, or explain, what enquiries it had made before commencing the deductions, nor had it explained what steps it had taken to ensure IL's health would not be impacted by the deductions. The FTT wrote that

it was satisfied DWP had not followed its own Benefit Overpayment Recovery Guide (referred to as the "BORG" in ***R(K)***).

Permission to appeal

14. On 23 August 2023, a salaried Tribunal Judge granted SSWP permission to appeal against the FTT's decision regarding appeal 1651-1450-8074-3928. The Judge referred to the Upper Tribunal decision in ***LP v SSWP (UC) [2018]*** UKUT 332 (AAC), which DWP had relied on as part of its appeal grounds. The Judge also referred to paragraphs 13 to 15 of ***R(K)***, observing that it described the powers in section 71ZB of the 1992 Act in respect of UC, but the same powers are provided in respect of NSESA. The Judge emphasised that in paragraph 13 of ***R(K)***, the High Court Judge, Steyn J. stated that there was no right to appeal against the decision to seek recovery, or not to waive recovery, of an overpayment of UC. The Judge also emphasised paragraph 15 of ***R(K)*** in which Steyn J. stated that the Secretary of State's discretion to waive recovery of an overpayment is of crucial importance.

15. The Judge observed that neither the FTT's decision nor DWP's application for permission to appeal, referred to a potentially relevant 2018 case in the European Court of Human Rights ("ECtHR"). The Judge wrote that ***Čakarević v Croatia (Application no. 48921/13)*** confirms an applicant could raise human rights arguments to successfully challenge the State's attempt to recover overpaid state benefit from her. The ECtHR considered that where a claimant had not contributed to an administrative decision being made wrongly or implemented wrongly, although benefit entitlement could be revoked for the future, there was an expectation it would not be called into question retrospectively. The ECtHR held this expectation should usually be recognised as being legitimate unless there were weighty interests to the contrary. The Judge observed that it was possible IL's appeal could also have been allowed on a human rights argument based on in ***Čakarević***.

16. The Judge granted permission to appeal to the Upper Tribunal, stating it seemed that the case raised issues of wider public interest about the recoverability of overpayments, the extent of the power to waive recovery and the tribunal's jurisdiction if it finds that SSWP has not exercised the power lawfully.

17. On 10 May 2024, I made observations and case management directions about appeal 1651-1450-8074-3928. The Upper Tribunal Office had also registered an appeal for the SSWP in relation to 1652-1887-4416-6432 (DWP's entitlement decision). This was because the SSWP had listed both appeals in its UT2 application form to the Upper Tribunal. I confirmed in my Directions Notice that I was not granting permission to the SSWP to appeal against 1652-1887-4416-6432. I was not satisfied the SSWP was actually seeking permission to appeal against that decision (which the FTT had decided in the SSWP's favour). Nor did IL dispute that he was paid the USS pension and that this meant he was not entitled to the NSESA that DWP had paid him.

Legal framework

18. Section 71ZB of the Social Security Administration Act 1992 provides the following that is relevant to this appeal:

> "**71ZB Recovery of overpayments of certain benefits**
>
> (1) The Secretary of State may recover any amount of the following paid in excess of entitlement—
>
> (a) universal credit,
>
> (b) jobseeker's allowance,
>
> (c) employment and support allowance, and
>
> [(d) except in prescribed circumstances, housing credit (within the meaning of the State Pension Credit Act 2002).]
>
> (2) An amount recoverable under this section is recoverable from—
>
> (a) the person to whom it was paid, or
>
> (b) such other person (in addition to or instead of the person to whom it was paid) as may be prescribed.
>
> (3) An amount paid in pursuance of a determination is not recoverable under this section unless the determination has been—
>
> (a)reversed or varied on an appeal, or
>
> (b)revised or superseded under section 9 or section 10 of the Social Security Act 1998,
>
> except where regulations otherwise provide."

19. Section 71ZB(1)(b) and (c) have been brought into force for the purpose of NSJSA and NSESA respectively (see Article 5(3A) of the Welfare Reform Act 2012 (Commencement No. 8 and Savings and Transitional Provisions) Order 2013). Section 71ZB(1)(d) has not yet been brought into force (which is why it appears above in square brackets).

20. Section 12(1) of the Social Security Act 1998 provides the following in terms of appeals that is relevant to this appeal:

"Appeals

12 Appeal to First-tier Tribunal

(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which—

(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or

(b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act;"

21. Schedule 3 to the Social Security Act 1998 provides that the following decisions about recovery of benefits are ones against which an appeal lies:

"*Recovery of benefits*

5. A decision whether payment is recoverable under section 71 or 71A of the Administration Act.

6. If so, a decision as to the amount of payment recoverable.

6A. A decision as to whether payment of housing credit (within the meaning of the State Pension Credit Act 2002) is recoverable under section 71ZB of the Administration Act.

6B. A decision as to the amount of payment recoverable under section 71ZB, 71ZG or 71ZH of the Administration Act."

22. Paragraphs 6A and 6B of Schedule 3 to the Social Security Act 1998 were inserted by section 105 of the Welfare Reform Act 2012. Paragraph 6A has not yet been brought into force.

Oral hearing on 17 March 2025

23. I held an oral hearing of this appeal by CVP video on 17 March 2025. The SSWP was represented by Mr Lewis of counsel. IL was represented by his ex-wife, Ms D. IL moved to Greece after the FTT hearing. Ms D took part in the hearing from Greece. It was possible, and consistent with, the Upper Tribunal (Administrative Appeals Chamber) Guidance Note dated 02 August 2022, for Ms D to represent IL. This was because the issue before the Upper Tribunal was about whether the FTT had made an error of law, and Ms D made oral submissions rather than giving oral evidence to the Upper Tribunal.

24. At the start of the hearing, Ms D explained IL was not going to take part in the hearing, as he found it difficult to deal with stress, which exacerbated the effects of his medical condition.

25. At the start of the hearing, Ms D also confirmed she did not have the bundle of authorities for the appeal (containing case law and legislation), or the skeleton argument Mr Lewis had prepared on behalf of the SSWP. Mr Lewis explained that the Government Legal Department, which represents the SSWP, had liaised directly with IL to agree the contents of that bundle with him. Ms D acknowledged this was possible and that IL had not passed the bundle or Mr Lewis' skeleton argument to her.

26. I explained to Ms D that she should have access to the bundle of legislation and case law and Mr Lewis' written skeleton argument so that she could understand the issues being addressed. I explained the Upper Tribunal's inquisitorial role means it would look at legal issues for itself and explore case law and legislation, even if a party did not feel able to address these directly. I explained the bundle of authorities was 127 pages long. Ms D stated she thought that having half an hour would be sufficient for her to look at the bundle and skeleton argument.

27. In the circumstances, and having spoken with the parties, I adjourned the hearing for 45 minutes, so that Ms D could be sent (and read) the authorities bundle and Mr Lewis' skeleton argument by email. The parties confirmed they wanted to go ahead, with Ms D having some time to look at the bundle. They indicated they were willing to go ahead with a 45 minute-adjournment. When the hearing resumed, Ms D confirmed she had been able to look at the documents quickly and was willing to proceed.

28. I was grateful to both Mr Lewis and Ms D for taking part in the hearing, and for their thoughtful and helpful submissions.

29. At the hearing, I indicated to the parties that I hoped to produce a decision within around one month to six weeks. However, it has taken longer, and has taken the full three months given to the Upper Tribunal to produce substantive decisions. I apologise to the parties, in particular, to IL and Ms D, that it has taken the longer period of time to produce my decision.

The parties' submissions

(i) Submissions for the SSWP

30. On behalf of the SSWP, Mr Lewis made the following submissions:

    (a) Section 71 of the 1992 Act makes general provisions in respect of overpayment recovery. It generally governs situations in which the person receiving the benefit is somehow at fault for the overpayment being made. It requires some degree of fault by the benefit recipient before an overpayment can be recovered. Section 71 does not apply to NSESA;

(b) By contrast, section 71ZB of the 1992 Act allows overpayments to be recovered even where they have been caused by the SSWP and the benefit recipient was not at fault in any way;

(c) The wording used to set out which decisions about recovering overpayments can be appealed, is important. This is set out in Schedule 3 to the Social Security Act 1998. The wording used for paragraph 5 of Schedule 3 emphasises that a person has a right to appeal about whether an overpayment is recoverable under section 71 of the 1992 Act. The wording used for paragraph 6 emphasises the right of appeal against the size of the overpayment;

(d) When introducing section 71ZB into the 1992 Act, Parliament only legislated for a right of appeal about the amount of an overpayment recoverable under section 71ZB. Paragraph 6B is equivalent to paragraph 6 (amount of overpayment). Parliament did not legislate to provide an equivalent to paragraph 5 (whether the payment is recoverable at all) for overpayments covered by section 71ZB;

(e) This approach was recognised by Upper Tribunal Judge Jacobs in ***LP v SSWP (UC) [2018]*** UKUT 332 (AAC) at paragraph 11 of his decision. That position has not been challenged subsequently;

(f) The fact a claimant cannot appeal against SSWP's decision to recover an overpayment under section 71ZB of the 1992 Act does not mean s/he is left without a remedy. A person could ask the SSWP to use her discretion to waive recovery of the overpayment, setting out the reasons why it should be waived. SSWP would then make a decision in response;

(g) If SSWP decided not to waive recovery of the overpayment, the person could take steps to issue a claim for judicial review in the Administrative Court, challenging the refusal to waive the overpayment. This is what happened in ***R(K)***. Steyn J.'s decision in ***R(K)*** confirmed there is no right to appeal against the SSWP's decision to recover an overpayment. Steyn J. considered relevant DWP guidance, including the BORG. Having done so, she concluded that SSWP's decision to recover the overpayment from K, failed to take into account relevant considerations, did not properly apply the relevant policies and lacked logic in specific ways;

(h) Steyn J. did not herself make a decision about whether recovering the overpayment should be waived. The effect of Steyn J.'s decision was that the SSWP would have to make again the decision whether or not to recover the overpayment from K;

(i) The FTT's decision about the overpayment paid to IL ignored the wording of paragraph 6B of Schedule 3 to the 1998 Act and looked at *whether* the SSWP could recover the overpayment from IL rather than how much could be recovered. This also failed to reflect the decisions in ***LP*** and ***R(K)***

confirming an FTT can consider the amount to be recovered but not whether it should happen at all;

(j) The FTT conflated two different processes (appeals to the FTT and judicial review to the High Court) by relying on ***R(K)***. The First-tier Tribunal does not have any judicial review jurisdiction. In using public law principles to impugn DWP's decision on public law grounds, the FTT exceeded its jurisdiction; and

(k) Dealing with ***Čakarević***, the SSWP accepts there is no reason why an applicant could not raise human rights arguments in a judicial review claim. However, the FTT has no jurisdiction to entertain a challenge to recover overpayments recovered under section 71ZB(1) and they could not be raised in an appeal to the FTT. In any event, IL has not attempted to pursue any human rights grounds in this appeal, including after the salaried Tribunal Judge raised the issue when granting permission to appeal.

31. In response to one of my questions about the inclusion of paragraphs 6A and 6B into Schedule 3 to the Social Security Act 1998, Mr Lewis submitted that paragraph 6A (which has not yet been commenced) makes it even clearer that paragraph 6B does not give an appeal right in relation to whether a NSESA overpayment is recoverable. Mr Lewis submitted that if paragraph 6B could be construed sufficiently widely to give an appeal right against whether a NSESA overpayment is recoverable, there would be no need to add a wording equivalent to paragraph 6A for housing credit cases.

32. In response to questions I asked about human rights, Mr Lewis acknowledged the directions I had made on 10 May 2024 explained the Upper Tribunal would want to hear arguments about them. He submitted the position was really the same as in the SSWP's main arguments – namely the FTT is the wrong place to make such arguments.

33. Mr Lewis submitted that the Human Rights Act 1998 states that public authorities, which would include courts and tribunals, have a duty to act compatibly with human rights, one of which is Article 1 to the first Protocol (protection of property). Mr Lewis submitted that section 6(2) of the Human Rights Act 1998 confirms the duty does not apply where one or more provisions in primary legislation prevent a public authority from acting in a different way.

34. Mr Lewis submitted that the FTT is a creature of statute, whose powers are decided by primary legislation. Mr Lewis submitted the FTT does not have the power to declare legislation incompatible with human rights law, or to respond to arguments about human rights in circumstances where it does not have jurisdiction (i.e., to decide whether NSESA overpayment is recoverable). Mr Lewis submitted those arguments have to be aired in the High Court by way of judicial review.

35. Mr Lewis submitted that in ***Čakarević***, the decision very much turned on the concept of Ms Čakarević having been given a legitimate expectation that she was

entitled to the money, which she could rely on to argue that she could expect the State not to recover the money it had already paid her. Mr Lewis argued this was one of the key threads in that decision. He submitted that this kind of argument is not one open to the FTT and Upper Tribunal to entertain in these kinds of proceedings but can and should be pursued in the Administrative Court.

36. Mr Lewis also submitted that the fact the circumstances in ***R(K)*** had given rise to a substantive legitimate expectation, involved a detailed and close assessment of DWP's actions. It would require identifying sufficiently clear and unambiguous conduct by DWP to give rise to that expectation. Furthermore, it was quite unlikely DWP had made an express statement that IL could remain entitled to the benefit overpaid to him.

37. Mr Lewis submitted that ***R(K)*** involved a fairly extreme set of factual circumstances where DWP had maintained payments, making statements on more than one occasion that they were correct. Mr Lewis submitted that this would have to be scrutinised in every case. Mr Lewis also submitted that K made strenuous efforts to query and clarify her entitlement with DWP. On that basis, the High Court decided it would be unfair and unjust to repudiate K's legitimate expectation of entitlement to the past benefit she had been paid. Mr Lewis submitted it would be an extreme case where legitimate expectation would arise for a claimant who had been overpaid.

38. Mr Lewis submitted that IL should have written to DWP to say it had made a mistake in overpaying him the approximate £8,000 of NSESA and to ask DWP to waive it. If DWP refused to do so, IL could issue a claim in the Administrative Court and say DWP had a discretion not to take the money and was wrong to take it for specific reasons, one of which could be IL's human rights. Mr Lewis submitted this did not change the fact that the FTT was the wrong place to advance those arguments and they should have been advanced in the High Court.

(ii) Submissions for IL

39. IL had made written submissions in the form of a letter dated 27 November 2023 (reiterated on 06 September 2024). These stated the FTT had exercised and interpreted the law with individualisation and sensitivity, which he believed was appropriate for the Rule of Law to work, especially for matters of social care and social justice. IL wrote that the FTT considered the specific circumstances, which in his opinion, showed clearly that he never intended to commit benefit fraud. IL also wrote that the FTT acted with empathy and understanding regarding his financial circumstances and the detrimental effect the recoverability of the overpayment decision was having on his health condition. He argued this is what a humane legal and judiciary system is.

40. IL also argued that if the law is not characterised by flexibility and is not applied with discretion and individualisation, we are in danger of falling for an uncommon type of discrimination. He argued that even if one citizen is treated unfairly or unlawfully, despite being blameless, the legal and judiciary system is not solid

and error-proof and has failed to serve its purpose. IL wrote that the law and judiciary system was treating him equally to someone who committed benefit fraud intentionally when it was obviously not true. He argued that treating civilians in this way does not promote an honest relationship between them and the State.

41. At the hearing, on behalf of IL, Ms D submitted that IL felt DWP had treated him like a criminal, due to the wording of the letters it sent him about the overpayment. These had been extremely aggressive at times, and at one point stated IL had failed to disclose the material fact that he was receiving the occupational pension.

42. Ms D submitted that there was no way for IL to know that he should have written to DWP stating it should not recover the money, rather than to appeal to the FTT. Ms D stated she did not understand how IL, as a benefit claimant, could know and have this information to proceed to a different court instead. Ms D submitted that she and IL had been very confused by DWP's actions and the way it had behaved.

43. Ms D stated that after IL lodged his appeal to the FTT, DWP continued taking money from his overpayments, when they had expected this would be halted while the appeal went on. Although there was a period of time when DWP stopped taking the money (and also started paying IL £4.58 per week for about 5 or 6 months), DWP started deducting money again, at a high rate (£200 per month). Ms D submitted that DWP had taken around £2,300 from IL's personal independence payment (PIP). IL's PIP had itself stopped being paid after he notified DWP he had moved to Greece and was receiving disability benefit from the Greek authorities.

44. Ms D stated that while the law stops where it stops, she wanted to emphasise the very detrimental effect the situation had on IL. She described applying for adaptations to the bathroom because of the difficulties in trying to bathe IL as his carer but being refused the adaptations because IL was receiving NSESA. She described that she and IL felt worried and trapped after DWP accused him of the overpayment and that it was an unstable time that put pressure on their marriage.

45. Ms D argued that DWP should have worded the NSESA claim form more carefully so that people did not fall into this situation. She also submitted that she did not know who held DWP accountable for the mistakes it admitted making (which did not seem to prevent it recovering the money it incorrectly paid out).

Legal analysis

46. Legally, the starting point is the wording of section 71ZB of the 1992 Act. Section 71ZB(1)(a) to (c) are clear in their terms. They allow the SSWP to recover any amount of UC, NSJSA and NSESA that has been paid in excess of entitlement (overpaid).

47. Section 71ZB(3) imposes a condition for recovering an overpayment under subsection (1). The requirement is that the original decision to pay the benefit has been reversed or varied on an appeal or revised or superseded under the Social Security Act 1998. These phrases are all describing a way of changing, in a formal and valid way, the entitlement decision that led to the overpayment arising. There is therefore a requirement to validly change the entitlement decision that created the overpayment, before it can be recovered.

48. Other than that, however, section 71ZB does not set out conditions that must be met for an overpayment of UC, NSJSA or NSESA to be recoverable.

49. Section 12 of, and Schedules 2 and 3 to, the Social Security Act 1998 deal with which DWP decisions can be appealed to an FTT. For the purpose of this appeal, the relevant provisions are in Schedule 3 to the Social Security Act 1998.

50. Paragraph 5 of Schedule 3 gives a right of appeal in respect of decisions whether benefit payments are recoverable under section 71 or 71A of the 1992 Act. Paragraph 6 of Schedule 3 then gives a right of appeal as to the amount of (over)payment that is recoverable.

51. In 2012, the Welfare Reform Act 2012 amended the 1992 Act to add in section 71ZB, as part of the suite of changes that introduced UC and the concepts of new-style JSA and new-style ESA. The Welfare Reform Act 2012 also amended Schedule 3 to the Social Security Act 1998 to add in new rights of appeal about recovery of benefits. These are paragraph 6A (not yet commenced) and paragraph 6B.

52. The wording and structure of paragraph 6A, which relates to housing credit payments, is equivalent to paragraph 5. For the benefit of housing credit, Parliament has therefore decided to give claimants a right of appeal about *whether* an overpayment of that benefit is recoverable.

53. The wording and structure of paragraph 6B is equivalent to paragraph 6. For the purpose of all benefits covered by section 71ZB of the 1992 Act, Parliament has therefore decided to give claimants a right of appeal about the size of the overpayment that can be recovered.

54. The effect is that Parliament has created the equivalent of the appeal rights in paragraphs 5 and 6, but only for housing credit overpayments. For UC, NSJSA and NSESA overpayments, the only appeal right given by Schedule 3 to the Social Security Act 1998 is the right to appeal against the decision about the *size* of the overpayment that can be recovered. A claimant will therefore be able to require DWP to prove, to an FTT's satisfaction, that it has correctly calculated the size of the overpayment that it states is recoverable.

55. I agree with Mr Lewis' submissions that the wording of paragraph 6B of Schedule 3 should be interpreted within the context of paragraphs 5, 6 and 6A. The wording of those provisions, and the wording of paragraph 6B itself, make clear that

paragraph 6B cannot be read as applying more widely than paragraph 6. It does not create an appeal right about whether an overpayment should be recoverable.

56. This leaves UC, NSJSA and NSESA claimants in the position where the SSWP can recover all overpayments of those benefits, irrespective of how they have been caused. Under section 71ZB(3), there must be a valid decision to change the original entitlement decision that caused the overpayment to arise in the first place. Subject to that requirement, however, there are no specific requirements for the SSWP to meet before she can recover the overpayment. A benefit claimant is therefore left only having a right of appeal about the size of the UC, NSJSA or NSESA overpayment that can be recovered by the SSWP.

57. This analysis is consistent with the decision of the Upper Tribunal in ***LP v SSWP [2018]*** UKUT 332 (AAC). In paragraph 10, Upper Tribunal Judge Jacobs set out the terms of section 71ZB of the 1992 Act. Judge Jacobs wrote:

> "This is different from the law that previously applied to most social security benefits: liability does not depend on a claimant misrepresenting or failing to disclose. It is also different from the law that applies to housing benefit: liability does not depend on whether there has been an official error or whether the claimant could reasonably have been expected to realise that too much benefit was being paid. That means that a claimant is liable for an overpayment even it was caused by the Secretary of State.
>
> 11. A claimant can appeal against 'the amount of payment recoverable under section 71ZB', but nothing else: section 12(1)(b) of, and paragraph 6B of Schedule 3 to, the Social Security Act 1998. So the claimant cannot challenge on appeal the Secretary of State's decision to recover the overpayment. He did at one stage make an argument about recovery for the waiting days in the assessment period, but he did not pursue that argument before the First-tier Tribunal. I am satisfied that the overpayment recoverable has been correctly calculated by the Secretary of State, as approved by the First-tier Tribunal. That means that there is no issue under section 71ZB that can help the claimant.
>
> 12. In giving permission to appeal, the First-tier Tribunal referred to Judge Wright's decision in *RW* and asked: 'is it arguable that this was [the Secretary State's] error which is to say an official error and therefore is not recoverable?' The answer is: no. The cause of the overpayment is irrelevant on an appeal under section 71ZB. It may be relevant to whether the Secretary of State decides to recover the overpayment, but the First-tier Tribunal and Upper Tribunal have no power to deal with that, as actual recovery cannot be the subject of an appeal.

13. Although the decision-maker's mistake is not a defence for the claimant, the Secretary of State did take this into account when deciding not to impose a civil penalty."

58. While I am not bound by the decision in ***LP***, as a matter of comity and for consistency of legal principle, single judges of the Upper Tribunal will normally follow the decisions of other single judges of the Upper Tribunal unless there is good reason to depart from them (***Dorset Healthcare NHS Foundation Trust v MH [2009]*** UKUT 4 (AAC) at paragraph 37). In any event, I agree with the analysis Judge Jacobs applied in ***LP***, which reflects my own.

59. It is also consistent with the judgment in ***R(K)***, which was decided some years later. In ***R(K)***, the High Court stated, at paragraphs 13 to 15:

"13. An appeal lies to the First Tier Tribunal against a decision under s.71ZB(3) revising or superseding a determination of entitlement to UC. Subject to any successful appeal, such a decision determines conclusively that the claimant has received benefit in excess of entitlement, and has the effect that the defendant has a statutory right to recover that amount. There is no right to appeal against the decision to seek recovery, or not to waive recovery, of an overpayment of UC.

14. It is plain, and there is no dispute, that the statutory power in s.71ZB to recover an overpayment of UC is wider than the statutory power in s.71 to recover overpayments. The s.71ZB power enables the Secretary of State to recover *any* overpayment of UC, irrespective of where any fault lies. It is true, as leading counsel for the defendant, Ms Ivimy, submits that s.71 is broad enough to encompass cases where the recipient has acted in good faith (as illustrated by ***Plewa v Chief Adjudication Officer*** **[1995]** 1 AC 249). Nonetheless, the claimant's description of this as a "*radically new statutory context*" seems apt. With the introduction of s.71ZB, for the first time, Parliament gave the defendant the power to recover overpayments even in cases where the fault lay entirely with the defendant's department, the benefit recipient having acted in good faith, disclosing all material facts with due diligence and making no misrepresentations.

15. As is common ground, s.71ZB is a power, not a duty, to recover UC overpayments. And that power falls to be exercised in accordance with public law principles. Given the breadth of the power in s.71ZB, and the unavailability of the defences developed by the common law to avoid injustice, the Secretary of State's discretion to waive recovery is of crucial importance. As Sedley LJ observed in *B v Secretary of State for Work and Pensions* (in the context of the narrower power in s.71),

> "…*his officials will have in a variety of cases to decide whether it is right to take advantage of his entitlement to recover overpaid sums which in all probability will have been spent, in cases like the present, by people who do not realise that they were being overpaid.*
>
> *There are restrictions in the Regulations on how much can be withheld at a time from future payments by way of recoupment; but this does not touch the underlying issue whether it is fair to recover the money at all*."

60. This part of the judgment in ***R(K)*** reflects Ms D's argument that if the SSWP can recover all overpayments, even where they were caused solely by DWP's actions and / or failures, this limits the scope to hold DWP accountable for those actions and failures. However, as explained in ***R(K)***, it emphasises the importance of the SSWP exercising its power to recover in a fair way. It does not change the statutory interpretation of section 71ZB of the 1992 Act.

61. Before bringing her judicial review challenge, K appealed to the First-tier Tribunal against DWP's decision that the UC overpayment in question was recoverable from her. Paragraph 63 of ***R(K)*** confirms that DWP's failures caused K's overpayment to arise in the first place. Paragraph 64 sets out the wording of the First-tier Tribunal's decision, which concluded that although the overpayment was caused by DWP's official error, the full amount of it was recoverable from K under section 71ZB. At paragraph 65 of ***R(K***), Steyn J. confirmed that K acknowledged (before the High Court) the First-tier Tribunal made the only decision it was able to make in her case.

62. After K's appeal to the First-tier Tribunal was unsuccessful, she asked the SSWP to waive recovery of the UC overpayment. When the SSWP refused to do so, K asked the High Court to judicially review the SSWP's refusal. Although the High Court quashed (set aside) the SSWP's decision, the High Court did so by using the powers it had been given to deal with judicial review challenges. As Mr Lewis submitted, the High Court's decision required the SSWP to decide, once again, whether to waive recovering the UC overpayment.

63. There is nothing in ***R(K)*** to suggest that K had a right of appeal to the First-tier Tribunal that allowed her to challenge the SSWP's decision to recover the UC overpayment from her. Instead, the High Court in ***R(K)*** emphasised that K could not successfully challenge the decision to recover the overpayment from her by appealing to the First-tier Tribunal.

64. Applying this to IL, his rights to appeal to the FTT against the SSWP's decisions dated 30 November 2021 and 30 December 2021 were limited to:

    (a) challenging whether the SSWP had correctly decided he was not entitled to NSESA (which IL did not, in any event, dispute); and

    (b) challenging whether the SSWP had correctly calculated the size of the NSESA overpayment that arose in his case.

65. Because of the limits on IL's rights of appeal about the SSWP's decisions, the FTT did not have the jurisdiction (legal power) to decide whether the NSESA overpayment was recoverable from IL.

66. The FTT's Statement of Reasons stated the FTT considered it did have jurisdiction to make its decision because it stood in the shoes of the SSWP. This is a reference to paragraph 25 of ***R(IB)2/04***. In that decision, a three-member panel of Social Security Commissioners indicated an appeal tribunal has power to decide any make any decision on a benefit claim that the decision-maker could have considered and made. The Commissioners' decision stated: "*The appeal tribunal in effect stands in the shoes of the decision-maker for the purpose of making a decision on the claim.*".

67. However, an FTT is created by primary legislation and can only exercise the powers that Parliament has given it to exercise. This means a FTT can only stand in the shoes of the SSWP in respect of a matter where a benefit claimant has a valid right of appeal to the FTT. The FTT's Statement of Reasons does not address whether IL's right of appeal under paragraph 6B of Schedule 3 allowed him to challenge DWP's decision to recover the overpayment. Nor did the FTT address the decision in ***LP***. DWP relied on both those matters as reasons why IL could not challenge whether the SSWP could recover the NSESA overpayment from him (see paragraph 5 of DWP response to appeal, page F of bundle for appeal 16511-1450-8074-3928).

68. Furthermore, while the FTT considered that ***R(K)*** gave a basis for it to decide that DWP made an error of law by failing to consider the consequences of recovering the overpayment from IL, the FTT did not address paragraphs 13 to 15, and 63 to 65 of ***R(K)***. As explained above, those paragraphs confirm a benefit claimant has no right of appeal against the decision to recover a UC (and, by extension, a NSESA) overpayment, and the only decision available to the FTT dealing with an appeal about one, is to decide the overpayment is recoverable, irrespective of the cause.

69. The FTT therefore made material errors of law, including by misdirecting itself in law.

Does the ECtHR decision in *Čakarević* have any effect on the above analysis?

70. In ***Čakarević v Croatia*** (Application 48921/13)***,*** Ms Čakarević was paid unemployment benefit by the Rijeka Employment Bureau for a longer period than the maximum entitlement period. The issue was whether a judgment in civil proceedings made to recover the overpaid benefit from her interfered with her human rights under Article 1 of Protocol 1 and if so, whether it was justified.

71. The ECtHR concluded there was an interference with Ms Čakarević's human rights under Article 1 of Protocol 1 and that it was based in law and pursued a legitimate aim. Dealing with whether the interference was proportionate, the ECtHR took into account the following:

(a) Ms Čakarević was not alleged to have contributed to the decision to pay her benefit incorrectly;

(b) The Rijeka Employment Bureau had taken a decision in Ms Čakarević's favour and continued to make the benefit payments, giving her a legitimate basis for assuming they were legally correct. Ms Čakarević could not be expected to realise that she was receiving benefit beyond the statutory maximum period;

(c) The Rijeka Employment Bureau made a mistake in not defining the period for which Ms Čakarević was entitled to further employment benefits. It perpetuated that mistake by continuing to pay her unemployment benefit for a period of around three years after the maximum period ended;

(d) Even though the reason the incorrect payments were made was entirely the result of an error by the State, Ms Čakarević was ordered to repay the overpaid amount in full, with statutory interest. This failed to establish any responsibility on the State for creating the situation. The State avoided any consequences of its own error, instead placing the burden on Ms Čakarević;

(e) Ms Čakarević offered to repay the debt in sixty instalments, but what she was ordered to repay included statutory interest and was a significant amount of money for her, given she was deprived of her only income source at that time, as well as her overall financial situation;

(f) The unemployment benefits Ms Čakarević received were modest and were spent on her subsistence; and

(g) When deciding Ms Čakarević had been unjustly enriched, the national courts had not taken into account her health and economic situation. This included poor health and her lack of bank accounts, income or property of any significance. In those circumstances, paying the debt, even in sixty instalments, would put her subsistence at risk.

72. The ECtHR decided that given these considerations, the requirement placed on Ms Čakarević to reimburse the unemployment benefits paid to her in error entailed an excessive individual burden on her. The ECtHR decided the decision therefore violated Article 1 of the First Protocol.

73. Section 6(1) of the Human Rights Act 1998 provides it is unlawful for a public authority to act in a way incompatible with a right under the European Convention on Human Rights. Section 6(3)(a) confirms that a public authority includes a court of tribunal. This means a tribunal may itself act unlawfully if it applies a legislative provision that breaches a party's Convention rights.

74. However, section 6(2) disapplies section 6(1) in two specific circumstances:

(a) where, as the result of one or more provisions of primary legislation, the public authority could not have acted differently (section 6(2)(a)); and

(b) where, in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way compatible with the Convention rights the public authority was acting to give effect to or to enforce those provisions (section 6(2)(b)).

75. In the present case, what makes the NSESA overpayment recoverable from IL and prevent him from being able to appeal that decision to an FTT, are provisions in primary legislation, namely section 71ZB of the Social Security Administration Act 1992 and section 12 of, and Schedule 3 to, the Social Security Act 1998. Having considered the wording of those provisions, it is not possible to read or give effect to them in a way that means the overpayment would not be recoverable, or to give IL a right of appeal against the decision to recover it. The outcome is:

(a) section 6(2) of the Human Rights Act 1998 applies to them, and section 6(1) is disapplied: and

(b) The FTT, and the UTT, are required to apply them in their full form to IL and other claimants in equivalent situations to his, with the result that IL, and claimants in his position, have no right to appeal to an FTT against a decision by the SSWP about whether to recover an overpayment of UC, NSJSA or NSESA.

76. Under section 4(1) and (2) of the Human Rights Act 1998, a declaration of incompatibility can be made in respect of a provision of primary legislation that is incompatible with Convention rights. However, only specific types of courts can do so (see section 4(5)). They include the High Court, but not the First-tier Tribunal or the Upper Tribunal.

77. It would be open for a party to raise the question of how ***Čakarević*** might apply as part of a judicial review challenge to the SSWP refusing to waive the recovery of an overpayment of UC, NSJSA or NSESA recoverable under section 71ZB(1)(a) to (c) of the 1992 Act.

Disposal of appeal

78. Having decided the FTT's decision regarding appeal 1651-1450-8074-3928 involved material errors of law, it is appropriate to exercise my discretion to set aside the FTT's decision dated 28 April 2023 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having done so, section 12(2)(b) of that Act provides that I must either remit the case to the First-tier Tribunal with directions for it to be decided afresh or to remake the FTT's decision myself.

79. At the hearing on 17 March 2025, Counsel for the SSWP invited me to set aside the FTT's decision for containing material errors of law and to remake its decision

regarding appeal 1651-1450-8074-3928. Ms D's position was she suspected IL would want the matter to come to an end.

80. Ms D queried whether IL would be able to challenge the increased tax liability he incurred as a result of receiving the benefit that the SSWP subsequently decided was overpaid. As I explained at the hearing, IL would need to raise that issue directly with HM Revenue and Customs ("HMRC"), since the decision he would want changed, is the one made by HMRC about his tax liability. Directing for a new FTT to decide the appeal would not change that position.

81. Having considered the parties' positions, I have decided to remake the FTT's decision. In doing so, I make the following findings of fact, drawn from the evidence before the FTT:

(a) IL was diagnosed with multiple sclerosis over 16 years ago. By the date he claimed NSESA, IL needed to use a wheelchair. He also had restricted upper limb function and experienced fatigue as a result of his condition;

(b) IL claimed NSESA on 27 April 2020;

(c) When claiming NSESA, IL declared correctly on his claim form that he was receiving an occupational pension;

(d) Acting on behalf of the SSWP, on 02 July 2020, DWP awarded IL NSESA from 04 May 2020;

(e) IL continued to be paid his occupational pension after 04 May 2020;

(f) As a result of being paid NSESA, IL incurred an increased tax liability to HMRC, which he was required to pay;

(g) Although IL had notified DWP at the outset of his claim that he was receiving an occupational pension, DWP did not act on this information until 13 October 2021;

(h) On 30 November 2021, DWP decided IL was not entitled to any NSESA for the period from 04 May 2020 to 29 November 2021 inclusive. On 30 December 2021, DWP decided IL had been overpaid £8,835.87 of NSESA that was recoverable from him;

(i) DWP's failure to act on IL's disclosure before 13 October 2021 caused an overpayment of £8,835.87 to arise for the period from 04 May 2020 to 29 November 2021 inclusive;

(j) IL's actions did not cause the overpayment to arise;

(k) Ms D, provided full-time care to IL during the period when the overpayment arose, and subsequently;

(l) During the period in which the overpayment arose, IL and Ms D had two school age children in their household; and

(m) During the overpayment period, IL was unable to work and to support his family. Those circumstances have not changed since the date of DWP's decision.

(n) the SSWP took steps to recover the NSESA overpayment throughout the appeals process, recovering it at £200 per month; and

(o) By 17 March 2025, the SSWP had recovered approximately £2,300 of the stated overpayment, by deducting it from IL's PIP benefit award.

82. The NSESA overpayment is recoverable from IL under section 71ZB(1)(c) and (3) of the Social Security Administration Act 1992. This is because on 30 November 2021, the SSWP revised the original determination to pay IL NSESA from 04 May 2020 onwards under section 9 of the Social Security Act 1998. The SSWP's entitlement decision dated 30 November 2021 was confirmed by a First-tier Tribunal on 28 April 2023.

83. As the appeal process to the FTT and Upper Tribunal has ended, it is open to IL, or Ms D as his representative, to ask the SSWP to waive recovery of the overpayment, on the basis that it arose as a result of DWP's actions. The SSWP's policy on waiving recovery of overpayments is set out at Chapter 8 of the published BORG guidance, a copy of which can be found at the following link: https://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide.

84. If they wish to pursue this, IL and / or Ms D, may wish to seek advice from a welfare rights organisation such as Citizens Advice or the Child Action Poverty Group, about whether, and if so how, to take the steps described at paragraph 83 above.

85. Finally, in looking at the BORG guidance, I note that paragraphs 4.6 and 4.15 of Chapter 4 of that guidance provide that where overpayment decisions are disputed, DWP will not suspend recovery of disputed UC, NSJSA or NSESA overpayments during the mandatory reconsideration or appeal process. The reason given at paragraph 4.15 explains why DWP started recovering the NSESA overpayment from IL even though he was appealing against the overpayment decision. The reason is:

> "*This is because only the value of the overpayment can be appealed – not the decision that it is recoverable. Therefore, any appeal will only revise the amount to be repaid, and so suspending recovering until after the appeal outcome would only delay recovery. For that reason recovery is not suspended for these benefits*".

Conclusion

86. The Secretary of State's appeal succeeds. I have remade the FTT's decision in the terms set out on page 2 of this decision.

Judith Butler
Judge of the Upper Tribunal

Authorised by the Judge for issue on: 20 June 2025