DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Paula Gray **CPC/1841/2017**

Decision

This appeal by the claimant is dismissed.

The decision of the Sutton tribunal made on 3 February 2017 was not in error of law and it stands.

This decision is made under section 12 (1) and section 12 (2) (a) Tribunals Courts and Enforcement Act 2007.

Reasons

1. This matter concerns the recoverability of an overpayment of State Pension Credit between 8 June 2010 and 4 July 2016 where the Secretary of State relied upon the ground of misrepresentation despite being unable to produce the form (PC 10) upon which the material representation was said to have been made. Whilst this is a legally interesting case, I remain conscious throughout that the subject matter is of significantly more interest to the appellant, the claimant, for whom the prospect of being the subject of a recoverable overpayment of in excess of £18,000 is a daunting one.
2. The case is before me because District Tribunal Judge Pierce granted permission to appeal from a decision of one of the judges in his District, accepting as arguable a point put forward by the appellant's representative that in seeking to reconstruct the contents of the PC 10 form the tribunal had gone beyond what was supported by other evidence and had engaged in guesswork about what it said. Judge Pierce refused permission on a further ground, that the tribunal should have adjourned for further attempts to be made to find the missing form completed by the appellant was not arguable. He was right to do so, and I did not extend permission to appeal to include that argument.

Matters before the Upper Tribunal

3. I made directions as to the filing of submissions. There was no consensus between the parties; the Secretary of State, then represented by Ms Kiley, did not support the appeal; the appellant, through her representative Mr Kopec, maintained the position contended for at the FTT and before Judge Pierce in the application for permission to appeal, and asked for an oral hearing before me. I

granted that application, given the nuanced legal arguments with which I was faced.

4. I held an oral hearing in central London on 22 October at which the Secretary of State was represented by Ms Smyth of counsel and the appellant by Mr Kopec, a welfare adviser from Croydon Council. Both advocates prepared and spoke to their helpful written submissions
5. At the conclusion of the hearing I gave directions that the Secretary of State was to provide me with a further submission on a particular issue, and that the appellant could respond. In respect of that matter Mr Jagger has acted for the Secretary of State.
6. I am grateful to all those who have provided me with submissions, both written and oral.

Background

7. The appellant, a widow in receipt of retirement pension, made an initial claim for Income Support in April 2000 on the claim form SP1. In June of the same year she completed another SP1 in relation to the Minimum Income Guarantee. On the basis of the information they contained she was, quite properly, awarded Income Support, and that award became an award of Pension Credit from 7 October 2003.
8. She was also, as she declared on those forms, in receipt of Disability Living Allowance, initially the mobility component only. Subsequently, on 2 June 2010, she became entitled to the middle rate of the care component of that allowance. This is an important award, because it may lead on to certain other benefits.
9. For this appellant, she may have been entitled to have somebody paid a Carers Allowance for looking after her, but nobody did. She had said in both of the forms that she had completed that she did not have a carer, and that was the position. Where a Carer's Allowance was not in payment the question arose as to whether she might be entitled to a Severe Disability Premium (SDP) as an addition to her Pension Credit award. Put shortly, she would only be entitled to that Premium if she lived alone.
10. The arm of the Department that dealt with Pension Credit payments was notified by that part which dealt with Disability Living Allowance about the recent entitlement to middle rate care. In light of the potential entitlement to SDP the pension credit office sent the appellant a form to complete. This form has been referred to as a PC 10, but it may have been an IS 10. The PC 10 should be used where Pension Credit is in payment; the IS 10 where the entitlement is to Income Support. It has been said in the response to the FTT and before me that the PC 10 form was returned to the Department, and a screenshot has been provided which is said to establish that, although it refers to the IS 10. It seems that the references to the form used maybe in error, but I have considered the text of each of the forms in use at the time and the distinction is not, in my judgment, of practical importance as they are similar, the purpose of each being to provide additional evidence of a claimant's circumstances, in this instance to establish the composition of the household to see whether or not she

would qualify for SDP. It is not in dispute that the appellant returned a form in connection with this issue.

11. On 16 October 2010 the Department put the SDP in payment from the date that the appellant's middle rate care award began, 2 June 2010.
12. Some six years later, it seems as part of a routine review, the Department noted that another person was living at the same address as the appellant. They telephoned her and she explained that her son lived with her; he always had, and he was on the electoral roll. There had been no attempt, she said, to hide the fact.
13. However, in the two forms that she had completed in the year 2000 for her original Income Support claim (which was then converted to Pension Credit), she had not indicated that her son was living with her. It is conceded both that she completed those forms to the effect that there was no one else in her household although her son was living with her at all material times, thus the two forms from 2000 contained misrepresentations of fact, although at the time they were immaterial: the presence of her son in her household would not have affected her entitlement to Income Support.
14. On 13 July 2016, following that telephone call the Department revised her entitlement on the basis that she had never been entitled to the SDP. It had added a considerable sum to her Pension Credit entitlement. During the period I am considering the addition of SDP was between about £50 and £60 per week, and because this sum had been overpaid for a period of just over six years the large overpayment to which I have already referred accrued.
15. The Department made an overpayment decision based upon the appellant having completed the form PC 10, supplied to her in September 2010, to the effect that she was living alone. That, it was said, was a misrepresentation, and the material cause of the payment of SDP, which in the agreed circumstances was an overpayment; the legal issue has been as to whether or not that overpayment is recoverable.

The legal provisions

16. I need set out only the provisions concerning the recoverability of an overpayment.

Social Security Administration Act 1992

Section 71

(1) where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure-

(a) a payment has been made in respect of the benefit to which this section applies; or

(b) any sum recoverable by on behalf of the Secretary of State in connection with any such payment has not been recovered

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

17. It is important to note that a misrepresentation can be wholly innocent and still found recovery.

The issues

18. Prior to the oral hearing I made directions in which I raised a number of questions. One was based upon a false premise, because in my FTT bundle a submission which I now know to have been made on behalf of the appellant appeared to have been made on behalf of the Pension Service. I need say no more about that. I asked

    (i) How does the doctrine known as the presumption of regularity sit with the burden of proof being on the Secretary of State, in any case where it is, and in particular in an overpayment case, where, although the formal burden is on the balance of probabilities as usual, historic case law has tended to see that burden as a strict one?
    (ii) Can there be a legal distinction between what is described here by the appellant's representative as guesswork on the part of the tribunal, but which might be referred to as unwarranted assumptions, as against appropriate inferences of fact, or are these matters always case specific; that is, fact specific?
    (iii) To what extent might the previous (apparently immaterial) misrepresentations as to the composition of her household in the Income Support and Minimum Income Guarantee forms completed in the year 2000 be considered to be the sort of secondary evidence which was envisaged as necessary by Upper Tribunal Judge Ward in *MK v Secretary of State for Work and Pensions* [2011] UKUT 12 (AAC) at [16]?
    (iv) Could such evidence support the finding of the FTT that the Department was less likely to have made a mistake than the appellant, the question posed by Upper Tribunal Judge Williams in *CG/3049/2002* at [14]?

The arguments before me

The appellant

19. The appellant, through Mr Kopec, argued that without the form apparently received by the Department on 16 October 2010, which the appellant accepted she had completed and returned although she could not recall the details, the misrepresentation could not be established. He argued against the approach taken by the respondent Department in the FTT that where the presumption of regularity applied the department was in effect deemed not to have made a mistake.

20. He relied upon the various forms being different from each other, which, he argued, militated against the judges "assumption" that the error in the two earlier forms had been replicated in the PC 10. The absent form relied upon by the Secretary of State asked a question that offered "yes" and "no" boxes, and he argued that without the form it could not be inferred which answer was given. He said that the case seemed to be one of making the misrepresentation fit the overpayment, rather than establishing that the overpayment flowed from the misrepresentation. It was, he said, a leap to assume that what might have been in the form was in the form. He did not argue that where the form no longer existed or could be found the appellant must win, but he emphasised that the evidence in the form was crucial, and should not be the subject of assumption.
21. He relied upon the dicta of Mr Commissioner Williams (as he then was) in *CG 3049/2002* which he argued suggested that in the case such as this the overpayment should not be recoverable; instead, as said in that case, 'the tree should lie where it fell'.

The Secretary of State.

22. Ms Smyth's case was that a misrepresentation could be established without the relevant form. She said that the findings of the tribunal were open to it on the basis of the totality of the evidence, including the oral evidence of the appellant, who had conceded that she may have made a mistake in completing the form in 2010.
23. She argued that the various forms were asking materially the same question, therefore the fact that there were two previous forms which had contained the alleged misrepresentation (although immaterial in relation to the claims those forms supported) was evidence which the tribunal had been entitled to take into account. The weight given to that evidence, absent perversity, was for the tribunal and not for me.
24. The presumption of regularity had a place in the overall assessment, although it was not determinative. The presumption would be applied as a matter of common sense given the individual facts of each case.
25. As to the case law in relation to the use of the presumption, she accepted that the position on the facts in this case may be a step beyond that in *Huxley v Secretary of State for Work and Pensions* reported as *R(CS) 1/00* but stressed that the matter was only one factor in the overall factual matrix. The fact that the computer records showed that a form (whether the PC 10 or the IS 10) had been received from the claimant, that the information in that form, the screen print showed, was checked and led to an award of SDP was an element of the evidential picture, and not a determinative use of the presumption of regularity.
26. She countered Mr. Kopec's argument based upon *CG/3049/2002* and the decision of Upper Tribunal Judge Ward in *MK v Secretary Of State for Work and Pensions* [2011] UKUT 12 (AAC) (hereafter *MK)* by saying that it was for the judge to make a decision in the absence of the form, and for the judge to have considered the circumstantial evidence and made a decision on the basis of that was not guesswork, but part of the daily work of the judge. Had there been no form and no

other evidence, matters would have been different; however here there was other evidence, and for the judge to have come to the decision arrived at was a legitimate conclusion on that evidence.

27. The burden of proof was the civil standard, as established in *In re B (Children)* [2009] 1 AC 11, applied in the context of a misrepresentation Under section 71 in *DG v Secretary Of State for Work and Pensions* [2011] UKUT 14 (AAC), and the conclusion on the basis of the evidence that the appellant had probably misrepresented on the form that she lived alone and that the overpayment flowed from that was unassailable.

My analysis

CG/3049/2002

28. In respect of Mr Kopec's argument in relation to *CG/3049/2002*, I set out the salient comments made by Mr Commissioner Williams (as he then was) in that case, to set the backdrop. Initially he spoke about *R(IS) 11/92.*

> *10 R(IS) 11/92 concerned the issue whether there was enough material to establish a ground for review of a previous decision under the then laws about review. The Commissioner accepts the submissions for the Secretary of State on this as follows (paragraph 41):*
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> *[41] And in this context "establishing" means "establishing". Certainly, conceded (the secretary of state's representative) the adjudicating authorities are entitled to draw inferences where such can be supported by the balance of probabilities. But from what is in this case can any probabilities be identified? A proper understanding and application of the rules of evidence (including the Ophelia) inhibits the operation of any presumptions. That leaves us in a total vacuum. With such a dearth of factual information, speculation cannot be informed; it can amount to nothing more than guesswork. To put it another way: if the missing documents are to be reconstructed, where is the material for such reconstruction?*

The Commissioner decided that the decisions could not be reconstructed, so they could not be reviewed. Or:

> *To change the metaphor: the tree must remain lying where it fell so many years ago.*

11 In this case the tribunal seems to have relied on R(IS) 11/92 in part – namely the issue of the missing claim form – without following the rest of the guidance given by the Commissioner in that decision. The tribunal should have tried to reconstruct the claim form. For a start, it should have ensured that it knew what the claim form actually asked. It probably should have looked rather further into the situation in which the claimant found herself on the facts when her husband died. What did the claim form actually ask her to say, and how did it apply to her? This is one of those cases where there is a very short record of proceedings and a very long statement. It is not at all clear from the record as a whole that the tribunal actually looked at the secondary evidence about the claim and the claim form in the way indicated in R(IS) 11/92.

…..

Remitting the case for rehearing Mr Commissioner Williams said the following:

14 As the whole case then depends on what that claim form did or did not say, the tribunal should do its best, following R(IS) 11/92, to reconstruct the form. That might, for example, involve taking evidence on oath or affirmation from the claimant about the full circumstances of the claim, and also seeing and putting to her a copy of the claim form that would have been used in 1997. And the tribunal must also bear in mind that if there is no evidence, it should not guess. The critical question is: are the submissions and assertions of either party just guesswork, or are they something more than that? In weighing the evidence and the lack of it, the tribunal must have the principle of equality of arms in mind (under article 6 of the European Convention on Human Rights). It should not make assumptions that the Department is less likely to have made a mistake than the claimant unless it has evidence for that. If the tribunal cannot establish what was in the claim form then, to repeat the words of Commissioner Mitchell, it should leave the tree lying where it fell.

29. It is clear from this that an attempt should be made to reconstruct the form if that can be done without resorting to assumption, including the assumption that the Department was less likely to make a mistake than the claimant. So, the question for me is whether that was what the tribunal in this case did.

The FTT findings and reasoning

30. The judge in the Statement of Reasons noted the claimant's evidence at [4] to be that the misrepresentations on the earlier forms may have been because, due to her health issues, she misunderstood the question as asking if she was cohabiting with anyone, and when asked about the completion of the form PC 10 she said that maybe she had given the same response as she thought she was being asked about a partner, although she had no recollection of completing the form. The material findings on the totality of the evidence were as follows:

[5] the Tribunal find that on the balance of probability the claimant did misrepresent on the form that she was living alone when in fact her son was living with her. This is because when she was specifically asked if anyone else was living in her household in the claim form in income support where individuals completing the forms are asked to tell the Department about any children whom they are not claiming for or relatives or anyone else the claimant on two separate occasions indicated "no". Therefore the tribunal find on the balance of probability when asked the question on form PC 10 does anyone live with you that she would have answered "no" as although the claimant has said this is a very different question to that asked in the SP1 forms the tribunal find that in fact they ask the same question in that the question is seeking to ascertain if there is anyone else in the household. On balance of probability having answered "no" previously when in fact her son

was living with her the tribunal find on the balance of probabilities claimant would have inserted the same answer."

31. Additionally, in the same paragraph the following finding was made.

"The tribunal is satisfied that it is highly unlikely that the Department would have failed to take into account the fact that the claimant son was living in her household if she had declared it on form PC 10 and would not have taken the positive action adding severe disability premium to her pension if in the form it was declared that there was someone else in her household."

32. The latter finding seems to me to be rather more than the converse of the earlier finding, and is a finding that goes beyond the mere adoption of the presumption of regularity.
33. In the following paragraph clarification of the reasoning behind the factual findings is recorded:

[6] "The tribunal bases its decision that there has been a misrepresentation on the fact that in two previous claim forms for benefit in 2000 the claimant misrepresented the fact that she was living alone, that she was not aware of what she had put in the form PC 10 in response to whether anyone else was living in her household and accepted that it was feasible that she may have misunderstood the question and answered that no one else was in her household and that positive action was taken by the Department in 2010 when it was said that the claim form was received… On the balance of probability a misrepresentation was made in the form PC 10."

The reconstruction of the form

34. In my judgment there was evidence available here in order to reconstruct the form, and that was what the FTT did. The prior misrepresentations on the same issue, albeit that there was some semantic difference in the questions asked, are evidence of the type envisaged by Judge Ward in *MK* when he said:

16. While I can accept that there may be circumstances in which it is possible to rely on a misrepresentation in a claim form without the claim form itself being available in evidence, there would have to be sufficient secondary evidence and here there was none.

35. Further, in considering that case it is important to recognise the rather different nature and effect of a disability living allowance claim form which gives indications of a person's level of disability in respect of a series of questions concerning daily living activities and mobility, and the claim forms in this case, which were concerned with the income support claim made in 2000 and the PC 10, investigating the current household arrangements for the purposes of potential SDP entitlement. As Judge Ward put it in *MK:*

To progress from a position that the claimant on the facts as now known was not entitled straight to a conclusion that he had misrepresented a material fact is to ignore the reality that medical professionals and others may also be involved in making an award of DLA (as we know happened on the later renewals in the present case) and to ignore the possibility that the DWP may from time to time make awards which, with the benefit of hindsight, are unduly generous.

36. A DLA award and the level of it is made after consideration of a complex claim form and perhaps with the benefit of a medical examination or other medical evidence. The decision involves issues of judgment, and reconstructing what is likely to have been said on such a form, and whether or not it constitutes a misrepresentation is fraught with possibilities. The decision in this case, however, was a binary one. If the appellant had an adult living with her she was not entitled to SDP. If she did not, she was. The question whether it was likely that the form is correctly completed, or a misrepresentation was made is more straightforward than in the DLA example.
37. What is the place of the presumption of regularity in reconstructing the form? I note *R(CS) 1/00*, a decision of the Court of Appeal in which Lady Justice Hale (as she then was) explained that the presumption was one of law, albeit rebuttable.
38. Ms Smyth referred me to the discussion concerning the status of presumptions, whether of law or of fact, in the case of *Shannan & Others v Viavi Solutions & Others* [2018] EWCA Civ 681 (hereafter *Shannan*) in particular paragraphs 83 to 84 in the judgment of Lady Justice Asplin; she also referred me to the most recent (2018) edition of *Phipson on Evidence*, the 19th edition. An earlier edition was referred to in paragraphs quoted by Asplin LJ from the judgment of Henderson J (as he then was) in *Entrust Pension Limited v Prospect Hospice Limited & Another* [2013] PLR 73 at [38] in which he considered the doctrine. At [38] he said:

"The presumption is, at least normally, a presumption of fact, not law, and as such it is rebuttable by evidence to the contrary. Thus viewed, the term "presumption of fact" is in my judgment something of a misnomer, because such a presumption does not shift the persuasive evidential burden of proof on the relevant issue, but merely "describes the readiness of the court to draw certain repeated inferences as a result of common human experience": see Phipson on Evidence, 17th edition… Not only are presumptions of fact always rebuttable, but the trier of fact may refuse to make the usual natural inference, notwithstanding that there is no rebutting evidence."

39. His conclusion, with which Asplin LJ agreed, was encapsulated by her at paragraph 84 as follows:

"… The presumption is no more than a rebuttable statement founded on common sense, of the inference it will normally be appropriate to draw in a given situation where primary evidence is lacking."

40. It may yet be that the position of the presumption of regularity in respect of the actions of an official is a presumption of law; it may be that in the period of almost 20 years since *R(CS) 1/00* the strict evidential view has altered. I am conscious that I have only been referred to the two authorities, and although *Shannan* is recent, the circumstances, concerning actions of trustees of a pension scheme within a private company, may differ from the presumption in respect of actions of public servants acting under a statutory duty. I do not need to decide the issue, because the distinction is not important for my decision.
41. Lady Justice Asplin in her own words and in the passage she quoted seems to be pointing out that a rebuttable presumption of regularity is a tool, rather than a key. To use Ms Smyth's apt expression, it is a part of the picture only. In this case the factual findings of the first instance judge make it plain that the presumption of regularity was not the decisive factor: the significant probative value of the prior misrepresentations was the key to the findings.
42. In the factual circumstances here there were two forms in which the claimant had, seemingly innocently, misstated her circumstances. The tribunal found those forms, together with the other strands of the evidence, to be sufficiently persuasive to discharge the burden of proof on the Secretary of State to establish that, on the balance of probabilities, a similar misrepresentation had been made in the more recently completed form PC (or IS) 10. Unless that conclusion was unavailable to the judge on the basis of the evidence, that is to say in the absence of irrationality or perversity, there is no error of law.
43. Mr Kopec's arguments both at the FTT and before me were that the questions were different in the forms completed in 2000 and the form completed in 2010. That, he said, militated against the usefulness of the earlier documents in shedding light on what the missing form was likely to have contained. I am persuaded, however, that this argument was really not for me. It was for the judge at first instance to look at those forms and consider, in light of that submission, the extent to which the differences were material. That is really saying no more than that it was the task of the judge to weigh the evidence, and attach what value he or she felt was appropriate to each part, and as a totality. For me to overturn the central factual finding of the FTT which is based upon that evaluation of evidence it would need to be legally perverse; a finding that no properly directed tribunal could have come to on the available evidence. Ms Smyth was correct when she said that whilst a different tribunal might have come to a different conclusion on that evidence that did not mean that the judge in this instance was wrong.
44. I accept that the burden of proof on the Secretary of State is the straightforward civil burden, although it is unusual in a case concerning welfare benefit entitlement for the burden of proof, whether legal or evidential, to be decisive: *Kerr-v-Department for Social Development*
[2004] UK HL 23 *(Kerr).*

The curtailment issue

45. In considering the screen prints at the hearing I wondered whether one might indicate that the Department knew of the appellant's son living in her household rather earlier than the terminal date of the overpayment decision; if that were so, the period of overpayment may be reduced. It was not possible for that screen print to be interpreted conclusively at the hearing, and I directed that the Secretary of State have an opportunity to clarify the matter in writing, and that Mr Kopec might respond. He has not done so, from which I conclude that he accepted the submission of Mr Jagger, as do I. It is helpful in explaining that references which I thought might so indicate, do not. I do not need to explain that further in the light of there being no apparent challenge to it. It is fair to say that this was a hare that I set running, and not Mr Kopec.

Conclusion

46. The question for the FTT was not whether it was more likely that the Department or the appellant had made an error where there was no other evidence to put into the picture, but whether, given the evidence that the appellant had made a mistake on two occasions as to the occupancy of her household, it was likely that she had made a third similar error. In deciding that it was, the judge at first instance was not making assumptions from the evidence but rational deductions from it: legitimate inferences which are permissible, rather than assumptions, which are not.
47. Accordingly, the judge was entitled to come to the view that the Secretary of State had established that the appellant was likely to have made a misrepresentation that led to the overpayment, and the decision that it is recoverable as a matter of law stands.

Upper Tribunal Judge Paula Gray

Signed on the original on 26 November 2018