DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made following a hearing on 11 March 2015 under reference [redacted] involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under paragraph 6(9)(a) of Schedule 7 of the Child Support, Pensions and Social Security Act 2000, any other issues that merit consideration.

B. The tribunal must proceed on the basis that time has already been extended for lodging the appeal.

C. The tribunal will have to consider whether to hold a hearing or to adjourn pending the decision of the Supreme Court in *MA v Secretary of State for Work and Pensions* and other cases, which are due to be heard in March 2016.

REASONS FOR DECISION

A. Introduction

1. This is one of a block of cases that all raise the same issue. The block consists of cases registered in the Upper Tribunal under references *CH/2391-2394/2015* and *CH/2401-2406/2015*. The local authority has, sensibly and realistically, supported the appeals. The claimant's representative has asked me to give reasons for my decision, which I do. He says there is a variation in approach taken in tribunals. Despite his useful chart of the structure of supersession provisions in housing benefit legislation, it would not be appropriate to embark on a treatise on the subject. I limit myself to the matters that can fairly be brought within the ambit of the decision in these cases.

B. The appeal to the First-tier Tribunal

2. In September 2014, the claimant lodged an appeal against the local authority's decision of 14 March 2014. The ground of appeal was that the claimant needed a separate bedroom from his wife on account of his disabilities. The local authority argued that the appeal was in effect against a decision made in March 2013 that the claimant was subject to a 25% reduction under regulation B13 of the Housing Benefit Regulations 2006. The appeal was, it submitted, late

and outside the absolute time limit for appealing. The claimant's representative disputed this and the First-tier Tribunal gave directions. Following a submission from the representative, the tribunal gave further directions. Following a reply by the local authority, the tribunal decided that (i) an appeal could not be admitted against the decision of March 2013, but (ii) 'The time limit in relation to decision dated 14 March 2014 is admitted.' I take that to mean that time was extended to allow the appeal to be lodged.

3. The case was listed for hearing and came before the same judge who had dealt with the case in the earlier stages. Both parties were represented. The judge repeated his decision that any appeal against the 2013 decision was late and not admitted. He then decided that 'The decision of 14.3.14 has not been challenged and as a consequence there is no appeal in relation to that decision.'

C. The judge's reasons

4. The judge gave detailed reasons. They originally consisted of 89 paragraphs over seven pages. On receiving the application for permission to appeal, the judge amended his reasons, deleting one paragraph and adding a further page consisting of 10 paragraphs. I leave to one side the legal basis on which that was done.

5. Much in the reasons is by way of background. One useful piece of information to emerge is that the landlord sought an increase of rent in most years, coinciding with the annual uprating of social security benefits, including housing benefit. The judge then analysed the decisions made in 2013 and 2014.

6. As to the 2013 decision, the judge decided that the local authority (through its computer system) had made two decisions. One dealt with uprating and any rent increase. The other dealt with the reduction under regulation B13. I do not need to say more about this part of his reasoning, as the 2013 decision is not (as I understand it) being challenged.

7. As to the 2014 decision, the judge said that this was an uprating decision. He referred to regulation 79 of the 2006 Regulations, which is in Part 9 of those Regulations and deals with the date on which a change of circumstances takes effect. He also referred to the Schedule to the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, which deals with decisions against which no appeal lies. He then said that there could be no appeal against a decision under regulation 79 as it was not listed in the Schedule. The judge subsequently deleted this part of his reasons.

8. The judge next came to the increase in rent:

> The amount payable was based upon the decision of the 14th March 2013 regarding the number of bedrooms a person was entitled to. That decision has not been changed at any stage. The amount of housing benefit payable as a consequence of an increase in rent charged by the landlord has no bearing upon the number of bedrooms a person is entitled to for housing

> benefit purposes. The council did not change their decision relating to a number of bedrooms a person was entitled to as a consequence of either the annual uprating or the notification of the increase in rent.
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> The notification of the change of circumstances amounting to an increase in rent charged does not open up all of the decisions that have been made in the past.
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> The information supplied by the local authority was that they did not even consider the number of bedrooms issue when the letter of the 14th of March, 2014 was issued …

9. I now come to the judge's additional reasons, which are in effect his response to the grounds of appeal. He said that neither the annual uprating of benefits nor the increase in rent related 'to either entitlement to benefit or one of the essential determinations that have to be made to decide entitlement or how much benefit is to be paid.' He decided that both were 'administrative alterations only.' Their only effect was 'mathematical'. He concluded:

> The only effect of the annual uprating and, on the facts of this case, the landlord's increase in rent was to alter the final figure. None of the building blocks which formed an integral part of the entitlement decision were affected.

It would, he said, be different if the increase in rent took it beyond what was accepted as a market rent.

D. Analysis

10. The judge's reasoning demonstrates a fundamental misunderstanding. In order to unravel it requires an examination of the decision-making process, the nature of an appealable decision, and the role of estoppel.

Single decisions

11. The decision-making process requires that there be a single decision that governs the claimant's entitlement to housing benefit for any day or period. That has been established since the decision of the Tribunal of Commissioners in *R(I) 9/63* at [18]. That decision concerned disablement benefit, but the reasoning is of general application. The Commissioners said:

> … it is not legally possible to have two decisions by different boards or tribunals on an identical question relating to the same period, which conflict with each other. Nor indeed is it convenient to have two decisions even to the same effect, since if one were reviewed there would then be a conflict.

In other words, there is always a single decision that governs entitlement, not (as the judge assumed) a series of decisions dealing with different elements or

components of entitlement. Those elements or components are sometimes referred to as determinations.

Determinations and outcome decisions

12. From the Social Security Act 1998, appeals do not lie against determinations, but only against decisions. This was reflected in the new terminology, which referred to 'outcome decisions'. This was confirmed by the Tribunal of Commissioners in *R(IB) 2/04*:

> ... in at least the great majority of cases, the appeal to an appeal tribunal is against what might be termed an 'outcome decision', that is to say a decision which directly determines the claimant's entitlement to benefit, either on the initial claim or subsequently. In this respect we adopt the analysis of Mr Commissioner Jacobs in paragraphs 24 and 25 of CIB/2338/2000:
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> '24. Standing back from the details of the Social Security Act 1998 and the regulations made under it, there is a clear theme uniting most of the decisions that are appealable. This is that they are, to use the new jargon, 'outcome decisions'. This is not a term of art. It is merely a useful expression to refer to decisions that have, in crude terms, an impact on a claimant's pocket. In other words, an outcome decision is one that directly affects the money that the claimant receives or might receive in the future.
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> 25. The determinations that are the building blocks of outcome decisions also, of course, affect the money that the claimant receives or might receive in the future. But they do not have this effect directly. They have this effect only when incorporated in an outcome decision. The claimant is able to appeal against the outcome decision and is able to challenge, as an issue arising on that appeal, the underlying determination.'

The same analysis applies under the Child Support, Pensions and Social Security Act 2000, Schedule 7 to which extended the 1998 decision-making scheme to housing benefit.

13. It may be that the judge based his original analysis on, or was influenced by, the way that the local authority's computer system handled the decision-making or on the way that the letters it generated set out and explained decisions. That may have given the impression that housing benefit entitlement is governed by a series of decisions. But that is merely administration; it cannot and does not override the effect of *R(I) 9/63* or *R(IB) 2/04*. The various components or elements of entitlement are separate determinations that together comprise a single outcome decision. If a local authority deals with a number of issues and their system issues separate letters in respect of them, only two analyses are possible in law. One is that they together form a single decision. The other is that there is a series of decisions with each one that is made revising or superseding the previous one.

14. Coming to the judge's additional reasons, these are based on an assumption that it is possible to distinguish between matters of entitlement and other matters that merely administrative or mathematical. The latter exclude matters that merely affect the amount payable. As I put it in *CIB/2338/2000* at [24], in a passage approved by the Tribunal of Commissioners in *R(IB) 2/04*, an outcome decision is one that has

> an impact on a claimant's pocket. In other words, an outcome decision is one that directly affects the money that the claimant receives or might receive in the future.

The judge's attempt to distinguish different parts of a decision from others is inconsistent with that passage and inconsistent with the structure of the housing benefit legislation. It attempts to distinguish between (what might be called) the structural elements of housing benefit entitlement and the actual figures that apply within that structure. There is no statutory basis for drawing that distinction and it is inconsistent with the analysis in *R(IB) 2/04*. It also has the effect of excluding from the appeal process a claimant who wishes to challenge the mathematical calculation undertaken by the local authority. Cases like this come before tribunals regularly. They form what is, surely, a paradigm case in which an appeal is appropriate. On the judge's analysis, the claimants' only remedy in such cases would be by way of judicial review.

Estoppel

15. Moreover, there is no estoppel operating from one decision to another. So a decision-maker (including a tribunal) is free to depart from previous decisions, within the limits permitted by revision and supersession. Section 17 of the Social Security Act 1998 provides:

> **17 Finality of decisions**
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> (1) Subject to the provisions of this Chapter and to any provisions made by or under Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulations under section 11 above, any decision made in accordance with those regulations shall be final.
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> (2) If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of—
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> (a) further such decisions;
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> (b) decisions made under the Child Support Act; and
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> (c) decisions made under the Vaccine Damage Payments Act.

Paragraph 11 of Schedule 7 to the 2000 Act makes equivalent provision for housing benefit decision-making. See the analysis by Mr Commissioner Angus in *CH/704/2005* at [14]. Having set out section 17, the Commissioner said:

> I regard sub-section (1) as a limited statutory estoppel which allows claimants and the Secretary of State to revisit, by way of revision, supersession or appeal, past decisions in order to take account of mistakes and changes in the fortunes and misfortunes of claimants. Sub-section (2) provides that there is no estoppel on the redetermination of factual issues relevant to decisions except in the few cases in which regulations provide for finality of such determinations. The provision in the housing benefit legislation corresponding to section 17(1) is section 68 of the Child Support, Pensions and Social Security Act 2000 as read with paragraph 11 of Schedule 7 to that Act. There seems to be no equivalent to section 17(2). Nevertheless, in the light of those provisions I agree with Miss Meacher that decisions by the statutory authorities do not create an estoppel on later decisions except to a very limited extent.

The 2001 Regulations

16. The judge was right to delete the paragraph relying on the 2001 Regulations. He had misread the Schedule. The only reference to Part 9 is found in paragraph 1A and it refers to the Housing Benefit (State Pension Credit) Regulations 2006, not the Housing Benefit Regulations 2006. There is no bar to bringing an appeal in respect of Part 9 of the latter.

17. Moreover, the 2001 Regulations are consistent with my analysis above. It is true that regulation 16(1) provides that

> (1) No appeal shall lie against a decision specified in the Schedule ...

and that the Schedule then repeatedly refers to

> ... a decision made by virtue of, or in consequence of, any of the provisions in [specified legislation].

But those provisions have to be read in the context of regulation 16(2):

> (2) In this regulation references to a decision include references to a determination embodied in or necessary to a decision.

The effect of this is that an appeal does not lie in respect of the specified aspects of a decision. It does not mean that each determination constitutes a separate decision.

18. It follows from this that the change in entitlement consequent upon the rent increase could not be separated from the reduction under regulation B13. Once there had been a supersession to take account of the rent increase, it formed a determination that was part of a new composite decision dealing with all aspects of entitlement, including the reduction under regulation B13. That means that

the claimant is entitled, each time a new decision is issued, to appeal against any aspect of the decision, regardless of whether or not it was changed, or even considered, by the decision-maker. Looked at from the point of view of the First-tier Tribunal, it has jurisdiction to deal with those issues on an appeal. This applies even if the claimant has not previously challenged the aspect of entitlement that is put in issue before the tribunal.

Signed on original
on 16 November 2015

Edward Jacobs
Upper Tribunal Judge