[2017] AACR 10

**(DK v Secretary of State for Work and Pensions
[2016] CSIH 84)**

CSIH **CSIS/168/2014**
Lord Drummond Young **CSIS/280/2014**
Lord Malcolm
Lord McGhie
8 November 2016

Tribunal procedure and practice – evidence – need to consider everything that has a bearing on issue

Living together as husband and wife – need to focus on the totality of the evidence when considering issues of sexuality or sexual relations

The Secretary of State decided that the appellant had been overpaid income support (IS) of over £45,000 which was recoverable from her because she had been living together with a man (GO) as his wife. She and GO both attended the First-tier Tribunal (F-tT) hearing and explained that GO was homosexual, that there was no sexual relationship between them and that they had only presented themselves as a couple because GO was anxious not to publicise his homosexuality because of the nature of his employment, in addition to mental health problems and alcoholism. The F-tT rejected the appeal, holding that the appellant and GO had both created a picture of themselves as living together as husband and wife, that the Secretary of State had been entitled to rely upon that picture and that the overpayment was recoverable from the appellant. The Upper Tribunal (UT) upheld those decisions and the appellant appealed to the Court of Session arguing that both the F-tT and UT had failed to address two critical issues: first, to decide whether there was a sexual relationship between her and GO, and secondly, if it accepted that there was none, to decide what bearing that had on whether they were living together as husband and wife: *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498.

Held, dismissing the appeal, that:

1. a tribunal must address the applicable legal test on the basis of the whole of the evidence, but in doing so it was not necessary that it should provide a detailed analysis of the evidence divided into discrete components; nor was it necessary that the tribunal should explain what evidence it accepted or rejected in relation to each of those components and the relevance or otherwise of each of them (paragraph 13);

2. a tribunal must address the fundamental issue, such as whether a couple are living together as husband and wife, and must give some explanation, albeit briefly, as to why it has reached a particular conclusion on that issue. Nothing in *Crake* indicates that that conclusion was required to be based on anything other than an assessment of the evidence as a totality (paragraph 15);

3. sexuality may be an important factor in deciding whether a couple are living together as husband and wife, but it could not of itself be determinative. It was merely one factor, which must be assessed by the tribunal along with all other relevant factors, and, on the authorities, it was not an essential component of living together as husband and wife. The proper approach involved focusing on whether the parties were living together as husband and wife, without giving undue weight to any individual factor that may be relevant to that issue. A single factor, such as sexuality or the existence or otherwise of a sexual relationship, was a factor to be taken into account, but no more than that: *PP v Basildon District Council (HB)* [2013] UKUT 505 (AAC) (paragraphs 16 to 17);

4. the F-tT had been entitled to conclude, on the basis of the whole of the evidence, that the appellant and the man were living together as a couple. The UT correctly decided that the F-tT's decision did not involve any error of law and that there was no basis on which it could have interfered with it (paragraph 23).

OPINION OF THE COURT OF SESSION
(INNER HOUSE)

Proceedings

1. The appellant received income support payments in the period between 1999 and 2012. Her entitlement to those payments would be affected if she were living with a man as husband

and wife during that period. In a decision dated 13 August 2012 the respondent decided that the appellant had been living together with a named man, GO, from 14 July 1999 onwards. The respondent further decided that from 14 July 1999 to 28 April 2004 and from 7 June 2004 to 19 July 2012 the appellant had no entitlement to income support as GO was in full-time employment. By a further decision made in December 2013 the respondent decided that overpayments of income support amounting to £45,770.34 had been made between 29 March 2002 and 19 July 2012, in that the respondent had misrepresented the material fact that she was living with a partner, GO. As a result it was decided that that sum was recoverable from the appellant.

2. The appellant appealed against those decisions to the First-tier Tribunal, which on 8 November 2013 refused both appeals; these were respectively numbered SC 100/13/07787 and SC 100/13/07784. She then appealed to the Upper Tribunal, which on 29 August 2014 also refused both appeals. The appellant's ground of appeal was that she and GO were not living together as husband and wife during the period from 1999 to 2012; both the appellant and GO asserted that they did not have a sexual relationship and that GO was homosexual, and it was contended that this precluded any finding that they were living together as husband and wife. That argument was rejected by both the First-tier and Upper Tribunals. The appellant has appealed against the decision of the Upper Tribunal to the court.

Legislation

3. The question arising in the appeal depends on provisions of the Social Security Contributions and Benefits Act 1992. Part VII of that Act relates to income-related benefits. Within that Part, section 136(1) provides as follows:

> "Where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of that person."

Section 137(1) (as amended) sets out a number of definitions that are relevant to the construction of section 136; these apply unless the context otherwise requires. The word "couple" is defined as meaning "a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances". The definition of the word "family" includes a couple. As already indicated, the critical question in the present case is whether, in terms of the foregoing provisions, the appellant and GO were living together as husband and wife during the period from July 1999 to July 2012.

Decision of the First-tier Tribunal

4. The First-tier Tribunal heard evidence from witnesses, who included the appellant and GO, and found it to be established that the appellant had made a claim to income support with effect from 14 July 1999; that she and GO were living together as an unmarried couple from at least that date; and that GO was in full-time employment from 14 July 1999 to 28 April 2004 and again from 7 June 2004 to 19 July 2012. The Tribunal records that by 26 July 1988 the appellant had described GO as her "boyfriend", and that GO had acknowledged on 16 December 1997 that the appellant was his partner. The parties went on holiday together on several occasions. When they booked holidays they booked them together, making use of tokens that required this to be done; this procedure was to their financial advantage. Motor vehicles were insured on several occasions, and in at least one case the appellant was the policyholder and GO was the named driver. GO was also recorded as being the "policyholder's partner". The appellant also arranged a loan in her name because GO could not obtain credit. GO attended family functions. On one occasion he advised his employers that the appellant was his partner and that she was his

emergency contact and next of kin. Subsequently, when he changed his employment, this was altered to another person.

5. GO explained these actings to the Tribunal on the basis of reticence to acknowledge or publicize his homosexuality in view of the nature of the industry where he worked, and also to a history of mental health problems and alcoholism. The Tribunal noted that it was satisfied that the parties had consistently over a period of years created a picture of being partners which was to their financial advantage in different spheres. It did not consider as credible that the appellant knew nothing of the insurance arrangements, as on at least one of the occasions she was the policyholder and insured. She certainly knew about the holiday arrangements and financial assistance that she gave to GO. The Tribunal rejected the explanation for the various statements made by GO over the years. It could not accept that what appeared to be a consistent course of conduct over many years could simply be explained or excused on the basis suggested, namely mental health issues, alcoholism and a reticence to acknowledge his homosexuality publicly. At the time GO was in a responsible job and it was not reasonable to assume that he did not understand what he was saying. While the picture presented by the parties over a period of years might have had as its intention their financial advantage, the Tribunal was satisfied that it also portrayed a picture of the parties' living together as husband and wife, and the respondent was entitled to rely on this.

6. Furthermore, the First-tier Tribunal held in relation to the appeal SC 100/13/07784, relating to the alleged overpayment, that the respondent was entitled to recover such an overpayment. It was satisfied that the appellant knew of a material fact and misrepresented that material fact. The calculation made on behalf of the respondent was accepted by the Tribunal.

Upper Tribunal

7. The appellant appealed to the Upper Tribunal on the ground that there had been no evidence available to the First-tier Tribunal relating to any sexual relationship between the parties or any child of their alleged union. Nor was there evidence regarding any local public acknowledgment of any such relationship notwithstanding the inquiries said to have been carried out by investigating officers. In all the circumstances it was submitted that there was insufficient evidence to enable the Tribunal to conclude that the appellant and GO were living together as a couple or as husband and wife.

8. The Upper Tribunal rejected the appeal. After recording the parties' submissions and the material parts of the decision of the First-tier Tribunal, it stated that it could be seen from the latter decision that the Tribunal reached their conclusion having regard to a number of factors which included the assertion as to GO's homosexuality. Every "living together" case depended upon an analysis of the evidence in the particular case, and a range of different factors could be relevant to the question of whether the couple were living together as husband and wife. Evidence of a sexual or an emotional relationship is not essential, although these were factors that would be material to determination of the issue. An assertion by the appellant and GO that he is homosexual did not necessarily exclude the conclusion reached by the First-tier Tribunal. The Tribunal had had regard to a number of factors, and drew the conclusion that the picture presented by the parties and in particular the appellant over a period of years was of the parties' living together as husband and wife.

9. The First-tier Tribunal had been entitled to reach that conclusion on the factors that it set out in its decision. The Tribunal had had regard to the assertions by both the appellant and GO as to GO's sexuality, but other factors had to be weighed. Although the appellant had argued that weight should not have been placed on some of those factors, the Upper Tribunal was not prepared to hold that the First-tier Tribunal was n**o**t entitled to rely on them. The factors relied on demonstrated the attitude of the appellant and GO towards their relationship at various times and

in specific circumstances. It was open to the First-tier Tribunal to rely on those factors in reaching their conclusion, and to reject the explanation for such evidence that had been given at a later date. It could not be said that the Tribunal had erred in law because they took a different view of the explanation for a particular adminicle of evidence from that advanced by the appellant. Every "living together" case depended on an analysis of the evidence. The Tribunal's statement of reasons, when read as a whole, indicated that they had taken into account and found aspects of marriage in the evidence presented to them. There was no basis for interference with their decision.

Contentions for the appellant

10. For the appellant, it was contended that the Upper Tribunal erred in law in holding that the First-tier Tribunal had been entitled to conclude that the appellant and GO had been living together as husband and wife during the period from 1999 to 2012. In what has been taken as the leading case on this question, the decision of Woolf J in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498, it was stated that the existence or non-existence of a sexual relationship was a "signpost" as to whether the test was satisfied. It was therefore essential for the Tribunals to consider whether such a relationship existed; it was necessary to ascertain, in so far as that was possible, both the manner in which and why persons were living together in the same household. The First-tier Tribunal had noted evidence given by GO to the effect that he was a homosexual and consequently was not the appellant's "partner", but in spite of that evidence it had found that the appellant and GO had created a picture of being partners. No tension between those factors had been recognized; nor was any attempt made to resolve that tension. That amounted to an error on the part of the First-tier Tribunal The Upper Tribunal had held that the First-tier Tribunal had regard to the assertion made by the appellant and GO about his sexuality, but they did no more than note that such evidence had been given. It was not sufficient for the First-tier Tribunal to have regard to that evidence, or note that it had been given; it had to decide what it made of the evidence, and if it accepted that there was no sexual relationship it then had to decide what bearing that had on the issue of whether the appellant and the named person were living together as husband and wife. The failure to perform that exercise was an error in the approach of the two Tribunals; they failed to address one of the critical issues in the case.

Function of the Tribunals

11. The present case involves an appeal from a decision of the Upper Tribunal but that in turn involves consideration of whether there was an error of law in the approach to the case by the First-tier Tribunal, in the manner contended for by the appellant. The challenge is ultimately to the method of reasoning of the First-tier Tribunal: in addressing the fundamental question in the case, whether the appellant and GO were living together as husband and wife, was it necessary for the Tribunal to reach a definite conclusion as to GO's sexuality and as to whether there was a sexual relationship between him and the appellant? Alternatively, was it sufficient for the Tribunal to consider the evidence that had been led on these issues and take it into account in reaching its decision on the central question: whether the appellant and GO were living together as husband and wife?

12. The process of reasoning undertaken by a tribunal in a case of this nature was described in *Karanakaran v Home Secretary* [2000] 3 All ER 449 in the following terms (*per* Sedley LJ at 477f–h):

> "[A] civil judge will not make a discrete assessment of the probable veracity of each item of the evidence: he or she will reach a conclusion on the probable factuality of an alleged event by evaluating *all* the evidence about it *for what it is worth*. Some will be so unreliable as to be worthless; some will amount to no more than straws in the wind; some

> will be indicative but not, by itself, probative; some may be compelling but contra-indicated by other evidence. It is only at the end point that, for want of a better yardstick, a probabilistic test is applied."

Thus in reaching a conclusion as to whether a particular legal test, such as living together as husband and wife, is satisfied, a court or tribunal must have regard to the totality of the evidence led that has a bearing on the issue. The individual items of evidence do not require to be assessed individually for their probability; what matters is the probability of the ultimate conclusion, and that depends on an assessment of the whole of the evidence that may have a bearing upon it.

13. To similar effect are remarks of Lord Penrose in *Asif v Home Secretary*, 1999 SLT 890 at 894G-I:

> "[N]othing could be more destructive of the efficient disposal of immigration appeals than the notion that the adjudicator and the tribunal are under an obligation to carry through a mechanical process of narration of the evidence, analysis of it into classes, and explanation factor by factor of the relevance, or irrelevance, credibility and reliability or otherwise of it."

That statement was expressly approved by the First Division in *Singh v Home Secretary*, 2000 SC 219, at 223. We agree entirely with those remarks; although they were made in relation to immigration tribunals, they apply equally in our opinion to tribunals dealing with social security. The critical point is that a tribunal must address the applicable legal test on the basis of the whole of the evidence, but in doing so it is not necessary that it should provide a detailed analysis of the evidence divided into discrete components; nor is it necessary that the tribunal should explain what evidence it accepts or rejects in relation to each of those components and the relevance or otherwise of each component.

Relevance of evidence regarding GO's sexuality

14. The appellant's argument turns upon the relevance of the evidence about GO's sexuality to the ultimate question in the case, whether she and GO were living together as husband and wife for the purposes of Part VII of the Social Security Contributions and Benefits Act 1992. The legislation that preceded the 1992 Act was considered by Woolf J in *Crake v Supplementary Benefits Commission, supra*, and his judgment has subsequently been regarded as a starting point in determining the meaning of the expression "living together as husband and wife". Woolf J stated the general approach as follows (at 502):

> "[I]t is not sufficient, to establish that a man and woman are living together as husband and wife, to show that they are living in the same household. If there is the fact that they are living together in the same household, that may raise the question whether they are living together as man and wife, and, indeed, in many circumstances may be strong evidence to show that they are living together as man and wife; but in each case it is necessary to go on and ascertain, in so far as this is possible, the manner in which and why they are living together in the same household; and if there is an explanation which indicates that they are not there because they are living together as man and wife, then it would not fall within [the relevant provision of the legislation]; they are not two persons living together as husband and wife."

At a later point in his judgment (page 505), Woolf J referred with approval to the then current supplementary benefits handbook. A number of criteria were identified as indicating when couples should be treated as living together as husband and wife, and these were described as "admirable signposts to help the tribunal… to come to a decision". Those criteria were:

> "whether they are members of the same household; then there is a reference to stability; that there is a question of financial support; then there is the question of sexual relationship; the question of children; and public acknowledgment."

15. Woolf J then turned to the reasoning that is required from a Tribunal (at 506):

> "It has got to be borne in mind, particularly with tribunals of this sort, that they cannot be expected to give long and precise accounts of their reasoning; but a short and concise statement in clear language should normally be possible which clearly indicates to the recipient why his appeal was allowed or dismissed."

It was nevertheless important that the decision should "grapple with the real issues which are before the tribunal". The reasons given could be short, and could consist of not accepting the evidence of the applicant and preferring other evidence which indicated that a relationship as husband and wife went beyond, for example, that of a mere housekeeper. It follows in our opinion that a tribunal must address the fundamental issue, such as whether a couple are living together as husband and wife, and must give some explanation, albeit briefly, as to why it has reached a particular conclusion on that issue. Nevertheless nothing in *Crake* indicates that that conclusion requires to be based on anything other than an assessment of the evidence as a totality, in the manner described in *Karanakaran* and *Asif*. Indeed, the reliance on the factors set out in the supplementary benefits handbook as "signposts" is a strong indication that what is required is an appraisal of the totality of the evidence, treating each of these factors as no more than that, and certainly not as determinative.

16. The evidence founded on by the present appellant relates to GO's sexuality and the claimed lack of any sexual relationship. The appellant complains that the First-tier Tribunal did not consider in terms whether that contention was correct. In this connection, we note that in *R (Apata) v Home Secretary* [2015] EWHC 888 (Admin), paragraph 31, the judge (John Bowers QC) rejected a contention that the claimant could not be a member of the social group of lesbians because she had had heterosexual relationships; he stated that sexuality, or the consciousness of sexuality, might alter over time, and persons might realize that sexuality at different times. We think that that falls within judicial knowledge; the examples of John Maynard Keynes and the Bloomsbury Group, or Oscar Wilde, are well known. Thus sexuality may be an important factor in deciding whether a couple are living together as husband and wife, but it cannot of itself be determinative. It is merely one factor, which must be assessed by the tribunal along with all other relevant factors. Further judicial comments in this area are found in the speech of Lord Clyde in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, at page 51, and the opinion of Lord Marnoch in *SH v KH*, 2006 SC 129, at paragraph [63]. None of these indicates that a sexual element is an essential component of living together as husband and wife.

17. The same is true of the decision of the Upper Tribunal (Administrative Appeals Chamber) in *PP v Basildon District Council (HB)* [2013] UKUT 505 (AAC), where it is indicated (at [29]) that the guidelines summarized by Woolf J remain relevant to the test of whether parties were living together as husband and wife, but they are not exhaustive. They are particularly relevant as showing the degree of emotional attachment between the parties, which must nearly always be a matter for inference rather than direct evidence. We agree with such an approach; it focuses on the ultimate issue in the case, whether the parties are living together as husband and wife, without giving undue weight to any individual factor that may be relevant to that issue. A single factor, such as sexuality or the existence or otherwise of a sexual relationship, is a factor to be taken into account, but no more than that.

Application to the facts

18. The critical question in the present case is whether the appellant and GO were living together as husband and wife during the period from 1999 to 2012. For the reasons discussed above, the sexuality of GO cannot be determinative of that question. Nor can the existence or otherwise of a sexual relationship between the appellant and GO. These are no more than factors that may be relevant to the critical question. Consequently it was not necessary for the First-tier Tribunal to carry through a detailed analysis of the evidence relating to these matters, in relation to the credibility or otherwise of that evidence and its relevance or otherwise to the Tribunal's final decision: *Asif*, *supra*, at page 894. Nor is it necessary for the Tribunal to make "a discrete assessment of the probable veracity" of the assertions as to GO's sexuality and the existence or otherwise of a sexual relationship: *Karanakaran*, *supra*, at page 477. Instead the evidence must be considered as a totality, with a view to answering the critical question before the Tribunal: whether the appellant and GO were living together as husband and wife.

19. In our opinion the First-tier Tribunal performed this task. It addressed the critical question, whether the appellant and GO were living together as a couple, and it found in fact that they were living together as an unmarried couple from at least 14 July 1999. The Tribunal concluded that on the basis of the facts found by it and the reasons set out in its decision the appeals should be refused. It notes that no one reason was particularly dominant, but when taken together the reasons led the Tribunal to its conclusions. We note that this is the correct approach, in the light of cases such as *Karanakaran* and *Asif*; the facts found and the reasons are treated as a totality, and it is the inference drawn from that totality that is decisive.

20. In its reasons the Tribunal refers to a range of items of evidence. These were: a statement by the appellant that GO was her "boyfriend"; an acknowledgment by GO that the appellant was his partner; the fact that the parties went on holiday together on several occasions; motor vehicles were insured in the name of the appellant as policyholder and GO was the named driver (and he was recorded as being "the policyholder's partner"); and the appellant arranged a loan in her name because GO could not obtain credit. The Tribunal also had regard to the fact that GO attended family functions, and advised his employers on one occasion that the appellant was his partner and emergency contact and next of kin. On the basis of these factors the Tribunal concluded that it was "satisfied that the parties had consistently over a period of years created a picture of being partners which was to their financial advantage in different spheres".

21. The Tribunal, in summarizing the evidence presented to it, recorded that the appellant had stated that she and GO were not a couple, and that GO stated that because of his homosexuality he was not a partner of the appellant and that they did not live as a couple. Counsel for the appellant criticized the Tribunal for not dealing expressly with that evidence. Nevertheless, it is clear from the reasons given for the decision that a range of other factors were regarded as decisive in concluding that the appellant and GO were a couple. The evidence about sexuality and to the effect that they were not a couple was a factor to be considered, but it did not require detailed discussion by the Tribunal; it was not of itself decisive. It is evident from the Tribunal's ultimate conclusion that the evidence that the appellant and GO were not a couple was rejected. The evidence about GO's sexuality, as we have already indicated, could not be decisive; even if he were homosexual he and the appellant could still be a couple. It is apparent from the First-tier Tribunal's reasoning, taken as a whole, that the evidence about the sexuality of GO was not regarded as sufficient to outweigh the other factors that indicated that he and the appellant were a couple.

22. Furthermore, we note that, if it were necessary for the Tribunal to make detailed investigations about either a person's sexuality or the existence of a sexual relationship between two persons, an intrusive inquiry would be involved. It would often be difficult to reach any conclusion, because contradictory evidence on such matters would be unlikely. Thus the

evidence in question would have to be assessed against any evidence pointing in the opposite direction, such as that the persons involved behaved towards others as if they were a couple. That is of course precisely the sort of evidence that the Tribunal treated as decisive in the present case. Consequently, in cases where sexuality or sexual relations are put forward as a reason for concluding that persons are not living as husband and wife, the practical difficulties of challenging that evidence directly make it particularly important that the tribunal should focus on the totality of the evidence rather than individual components. Those difficulties also indicate why it would be quite unreasonable to expect a detailed assessment of the particular evidence given about such matters.

23. For the foregoing reasons we are of opinion that the First-tier Tribunal was entitled to conclude, on the basis of the whole of the evidence, that the appellant and GO were living together as a couple. It follows that the Upper Tribunal was correct in deciding that the First-tier Tribunal's decision did not involve any error of law. We observe that the Upper Tribunal found that the First-tier Tribunal did have regard to the claims regarding GO's sexuality, but weighed other factors against them. What is involved is, as the Upper Tribunal notes, an assessment and analysis of the evidence, and no basis was disclosed on which it could interfere with the decisions made at first instance. We agree with that conclusion.

24. For the foregoing reasons we are of opinion that this appeal must be refused.