DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Chippenham First-tier Tribunal dated May 18, 2016 under file reference SC130/13/00096, SC130/13/00105 and SC130/13/00108 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decisions under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decisions dated March 6, 2013, as finally revised on March 15 and March 21, 2016, is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeals should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge previously involved in considering these appeals on May 18, 2016.

(3) If the Appellant has any further written evidence to put before the tribunal, this should be sent to the regional tribunal office in Cardiff within one month of the issue of this decision.

(4) The Secretary of State should prepare a fresh response for the Tribunal hearing the appeals which must meet the requirements of paragraph 50 below. This must be sent to the regional tribunal office in Cardiff within one month of the issue of this decision.

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This is an appeal about a substantial overpayment of state pension credit (SPC). The First-tier Tribunal ('the Tribunal') found that the Appellant was liable to repay an overpayment of SPC amounting, in aggregate, to £31,423.44. The Appellant has pleaded guilty to various offences of benefit fraud. However, I am allowing the Appellant's appeal on what is essentially a 'due process' ground. In short, I conclude that on the balance of probabilities the Appellant was not properly notified of the Secretary of State's final revised decision (issued late in the Tribunal proceedings and as purportedly upheld by the Tribunal). The Tribunal then went ahead and confirmed that revised decision which had not been notified to the Appellant. In the circumstances this amounted to a material error of law by the Tribunal.

2. Accordingly, the Appellant's appeal is allowed. The Tribunal's decision involves an error on a point of law and is set aside. The case now needs to be reheard by a new First-tier Tribunal. I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee whatsoever that the re-hearing of the appeal before the new Tribunal will succeed *on the facts*. So the new Tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes.

3. There are technically three appeals before the Upper Tribunal. They relate to the three Tribunal appeals under case references SC130/13/00096, SC130/13/00105 and SC130/13/00108. This decision covers all three appeals. All page references below are to the Upper Tribunal file in the lead case, namely CPC/3137/2016 (First-tier Tribunal file reference SC130/13/00096). I also refer to a small number of other documents which have only come to light as I have been finalising this decision, and so which have not been copied to the parties. I have not delayed matters by inviting comments on these other documents as they have not materially affected the outcome of this appeal. They are referred to in this decision by the reference "p.***".

The wider context: the criminal proceedings

4. The wider context is not promising from the Appellant's point of view. On September 11, 2014 the Appellant pleaded guilty at Taunton Crown Court to five offences of fraud contrary to section 1 of the Fraud Act 2006 (p.1064). Each of the five charges on the indictment concerned an allegation that he had dishonestly, and with intent to make a gain for himself, failed to disclose certain information that was relevant to his claim for SPC to the Department for Work and Pensions (DWP). The Appellant was sentenced to 4 months imprisonment on each count, suspended for 2 years, and made subject to a curfew. A sixth charge, relating to fraud on the basis of a dishonest false representation, was ordered to lie on the file. The total loss to public funds was stated to be £32,666.54 (p.235).

5. I am aware that the DWP's Financial Investigation Unit maintains a keen interest in this case, not least as there are also apparently confiscation proceedings on foot in Taunton Crown Court under the Proceeds of Crime Act 2002. The details of those proceedings are not before me and are indeed are not directly relevant to what I have to decide. It is regrettable if those other proceedings are further delayed by the present decision. However, whatever the underlying merits (if any) of his case, the Appellant should not be prejudiced by the previous failings of both the DWP and Her Majesty's Courts and Tribunal Service (HMCTS) in this matter.

The DWP's original decisions, the First-tier Tribunal and the DWP's Responses

6. It is no easy task to make sense of the protracted history of these appeals. The file in the lead appeal now runs to just short of 1,500 pages (inevitably with some duplication). The account that follows necessarily concentrates on the most important features.

7. On March 6 and March 13, 2013 the DWP decision-maker made a series of five decisions to the effect that the Appellant was not entitled to, and had been overpaid, SPC and that various such amounts of SPC were recoverable from him. The Appellant appealed against those decisions.

8. On October 3, 2013, the DWP issued its first full response to the appeals (p.1A), prepared by one of its officers who I shall call 'ET' in this decision (all DWP staff will be referred to by their initials, just as the Appellant's identity is anonymised). There were five separate SPC overpayment appeals, which can be summarised thus (the three currently live appeals are italicised):

Appeal reference no.	Cause of overpayment	Amount of recoverable overpayment
SC130/13/00096	*Rental income from annex*	*£7,484.40*
SC130/13/00098	Annuity	£242.55
SC130/13/00105	*Capital*	*£4,144.92*
SC130/13/00106	Self-employed earnings	£1,103.97
SC130/13/00108	*Wife's earnings*	*£19,403.96*

9. As the Tribunal correctly noted in its initial directions of April 17, 2014 (p.219) (i) these overpayments totalled £34,544.24; and (ii) the relevant periods for the overpayments appeared to overlap, raising the question as to whether there had been any duplication of recovery. The DWP's supplementary responses to these directions were less than illuminating (pp.222-226). I should add that in this decision I am not including any details as to the relevant periods of the alleged overpayments, as that will make the narrative even more difficult to follow with no commensurate advantage.

10. On October 29, 2014 the DWP issued its second full response to the appeals, prepared by JL (pp.241 & 504). The second response confirmed the amounts of the overpayments for two of the appeals, SC130/13/00096 and SC130/13/00108, but proposed "suggested modifications" for the other three appeals, with the result that the sums now sought to be recovered were significantly reduced, as follows (again, the live appeals are italicised):

Appeal reference no.	Cause of overpayment	Amount of recoverable overpayment
SC130/13/00096	*Rental income from annex*	*£7,484.40*
SC130/13/00098	Annuity	£241.08
SC130/13/00105	*Capital*	*£ nil*
SC130/13/00106	Self-employed earnings	£1,103.97
SC130/13/00108	*Wife's earnings*	*£2,540.14*

11. As regards the amount of the overpayment for appeal SC130/13/00108 (the Appellant's wife's earnings), the submission recognised that a substantial amount of SPC would have been paid if the Appellant's wife had not recommenced employment, and that such a sum (amounting to £16,863.82) should be offset against the overpayment, producing a net overpayment figure of £2,540.14. The

proposed reduction to nil in appeal SC130/13/00105 was likewise the consequence of a corresponding underpayment of SPC. The very modest change to appeal SC130/13/00098 (a reduction of just £1.47) was based on a causation finding. Relying on the figures as set out above, the aggregate total of the net recoverable overpayment had now dropped to £11,369.59.

12. On November 12, 2014 a Tribunal dealt with the appeals relating to the Appellant's annuity and self-employed earnings. Accordingly, that left the three other appeals concerning (a) the rental income from the annex, (b) the wife's earnings and (c) the Appellant's capital to be resolved. The Tribunal made directions requiring the DWP to prepare a final response on those appeals including "a calculation of the combined net overpayment, showing how it has been calculated throughout the period and supported by evidence" (p.1026). The DWP's submission was required within 9 weeks, i.e. by January 14, 2015.

13. January 14, 2015 came and went. On April 14, 2015, a District Tribunal Judge issued directions requiring the DWP's still outstanding submission (as previously directed on November 12, 2014) to be produced within 21 days, failing which the DWP "shall automatically be barred from taking further part in the proceedings" (p.1055).

14. On April 16, 2015 the Tribunal received the DWP's submission (p.1031). It did not comply with the Tribunal's directions of November 12, 2014. It also produced different recoverable figures to those suggested in the second full submission, citing overpayments of £19,403.46 and £4,144.92 (i.e. using the amounts recoverable as stated in the second full submission but without applying the offsets for underpayments of SPC). On April 22, 2015 the District Tribunal Judge made further directions that the DWP file copies of the Appellant's convictions, requiring the DWP's compliance within 21 days (p.1056). These directions were not issued until May 3, 2015.

15. On May 7, 2015, the District Tribunal Judge made further directions requiring compliance within 14 days, failing which the DWP would be barred from taking further part in the proceedings (p.1058). Those directions were not issued until July 9, 2015.

16. On September 11, 2015, and so well after the time limit for compliance had expired, another District Tribunal Judge issued a ruling barring the DWP from taking further part in the proceedings because of its non-compliance (p.1059a). That ruling was issued on September 21, 2015.

17. In reply, and on September 28, 2015, the Tribunal received a very short three sentence response dated September 25, 2015 from the DWP (p.***). This response explained that the appeals officer previously dealing with the case had "since moved on from the Department and the issue regarding information requested in the Tribunals earlier Directions Notices has only recently come to the attention of the Department". The response also asked that in the interests of justice for both parties the Respondent should be allowed to re-engage with the proceedings. The DWP's response was referred to a District Tribunal Judge the following day. There is no indication that the DWP's response was copied to the Appellant, either by the DWP itself or by the Tribunal office.

18. On October 16, 2015 a Tribunal clerk wrote to the DWP on the District Tribunal Judge's instructions (p.***). The substance of the letter read as follows:

> "Within 28 days of this notice the respondent shall send a submission in accordance with [the District Tribunal Judge's] directions of 03/05/2015. The submission should also explain why the Respondent failed to deal with earlier directions and why they should be allowed to re-engage in the appeals."

19. In reply, and on October 30, 2015 the DWP sent the Tribunal a further "additional response" which in effect reiterated the modifications proposed in the second full response (see paragraph 10 above). This additional response was prepared by JM (p.1061). To be fair, this response, which was duly issued, made a concerted attempt to comply with the outstanding directions, involving the provision of nearly 200 further pages of submissions and (mostly) evidence. However, it did not in terms "explain why the Respondent failed to deal with earlier directions and why they should be allowed to re-engage in the appeals" (as had been directed – see paragraph 18 above). Meanwhile the Tribunal office was liaising with the Appellant over the most appropriate hearing venue for the appeals. A hearing date was fixed in February 2016 and then postponed, prompting a letter to the Tribunal from the DWP dated January 28, 2016 (p.***), asking for a hearing date to be set as soon as possible (and completely and blithely ignoring the fact that the DWP was at this stage still barred from participating in the appeals).

20. On February 9 and February 16, 2016 the DWP then belatedly contacted the Tribunal office to find out what had happened to its request made on September 25, 2015 that the order barring it from participating in the appeals be lifted. A clerical note on GAPS2, the Tribunal's computer-based case management and records system, recorded that it was "unclear if the de-barring request was actioned correctly". The matter was referred to another District Tribunal Judge.

21. On February 22, 2016 the new District Tribunal Judge lifted the barring order to enable the DWP to participate (p.1254). On March 9, 2016 the same District Tribunal Judge issued further directions requiring the DWP to provide a further and final submission by April 8, 2016 including, amongst other things, fresh decisions on all entitlement and overpayment issues, referenced to particular counts on the indictment (p.1254A). The Appellant was directed in turn to file his reply to such a new response by April 29, 2016.

22. On April 8, 2016 the DWP prepared a final response on the appeals (submission written by TD, pp.1255-1276). This 20-page final response reported that new entitlement and overpayment decisions had been taken on March 15 and March 21, 2016. The Appellant's SPC entitlement was revised owing to the failure to disclose (i) annuity income; (ii) the Appellant's self-employed earnings; (iii) rental income; (iv) capital payments and (v) his wife's earnings. The result was said to be a recoverable overpayment of £31,423.44.

23. On April 27, 2016, the Tribunal office received an e-mail from the Appellant (p.1302), stating he had not received a copy of any further DWP submission and so could not himself respond to it by April 29, 2016, as he had been directed. He added "no doubt [the District Tribunal Judge] will set new parameters", pointing out that the DWP had previously been barred for non-compliance. The contemporary GAPS2 record for the same date notes "it looks like the FTA [First Tier Authority, i.e. the DWP] have not responded".

The First-tier Tribunal hearing and decision

24. On May 18, 2016, the same District Tribunal Judge held an oral hearing of the appeal. TD, the author of the DWP's final response, attended as presenting officer. The Appellant did not attend. The two lines of text in the handwritten record of

proceedings notes "App not contactable" (p.1277). The Tribunal proceeded with the hearing. There is no note of any questions put to the presenting officer or to his answers (if any).

25. The District Tribunal Judge dismissed the appeal, confirmed the new DWP decisions dated March 15 and 21, 2016 and recorded that the Appellant was therefore liable to repay a recoverable overpayment of SPC amounting to £31,423.44 (p.1278). The decision notice only stated the global figure and did not particularise it by reference to the individual appeals.

26. On June 7, 2016 the Appellant requested a statement of reasons (p.1279). On June 14, 2016 he applied for a set aside of the Tribunal's decision, noting the reference to a decision dated March 15, 2016 and stating "I have not been notified of any [such] decision by the Respondent. Further I do not recognise the figure of £31,423.44".

27. In the subsequent statement of reasons, dated July 29, 2016, the Tribunal recorded as follows in its opening and introductory paragraphs:

> "1. The appellant has requested this written judgment for the decision handed down by the Tribunal on 18th May 2016. I apologise that this has taken so long to come to fruition. The supplementary submission provided by the Pensions Service at the hearing which in effect tied everything together, re-made all the relevant decisions in this case and provided the total overpayment together with the formal reasons behind what happened in this case was not placed on the court file. The author of the supplementary submission I understand then took seriously ill and following the judgment request significant attempts had to be made to locate the documents in question. I can only apologise to the appellant for the delay.
>
> 2. This was a somewhat complicated matter which has taken significant amounts of time to be resolved. It is lamentable that the proceedings have taken so long however there it is. The final decisions in this matter have been made.
>
> 3. The decisions in this case were originally made in 2013. The original decisions of 2013 were however completely incorrect and had created something of a mess that was resolved in March 2016 by the re-making of the original decisions with what I upheld to be correct decisions. I am indebted to Mr [TD] from the Pension Service for his efforts in assisting the Tribunal to resolve this case."

28. The Tribunal's statement of reasons then runs to 5 pages and 32 paragraphs. It does not actually explain how the new final SPC overpayment figure of £31,423.44 was arrived at. Neither, in truth, does the DWP's final submission dated April 8, 2016, although its narrative is littered with plenty of figures; nowhere, however, is any elementary addition explained. The total figure appears to include the amounts already found to be recoverable in the earlier Tribunal decision on November 12, 2014 (see paragraph 12 above).

29. On September 2, 2016 the District Tribunal Judge refused the Appellant's application for a set aside and also refused permission to appeal (that said, although the Appellant was obviously unhappy with the decision, it is not clear he had actually applied for permission to appeal).

A summary of the proceedings before the Upper Tribunal

30. On October 6, 2016, the Appellant applied to the Upper Tribunal for permission to appeal (p.1288), setting out five grounds. The first two grounds concerned the DWP's decisions of March 15 and 21, 2016 and the (new) SPC overpayment figure of £31,423.44. I subsequently gave the Appellant permission to appeal (p.1311). My principal reason for giving permission to appeal was my concern that "it appears the hearing went ahead when the Appellant had not had sight of the further DWP submission now at pp.1255-1276 (let alone the underlying [and brand new] decision). If that is right, then there was a plain breach of natural justice, whatever the merits of the underlying appeals" (p.1312). There have subsequently been two rounds of written submissions, from Mr Wayne Spencer (on behalf of the Secretary of State) and the Appellant in person. I have also interrogated the Tribunal's GAPS2 records system and invited submissions from the parties on what those inquiries have revealed.

31. Put very simply, it seems to me this appeal to the Upper Tribunal turns on two issues: (1) did the Appellant receive a copy of the DWP's final submission by TD and which is now to be found at pp.1255-1276?; and (2), if he did not, did it make any material difference to the outcome?

Did the Appellant receive a copy of the DWP's final submission?

The submissions on behalf of the Secretary of State

32. Mr Spencer, for the Secretary of State, approaches this in two stages. First, did HMCTS send the Appellant a copy of the DWP's final submission? (There has been no suggestion the DWP sent the Appellant a copy direct, a possibility which in any event I can dismiss for reasons that will become apparent.) Second, and assuming HMCTS did send him a copy, did the Appellant receive it?

33. As to the former question, Mr Spencer makes two points. The first is that the Tribunal's statement of reasons expressly records (at paragraph 20) that the Appellant "has been served with the new material", a finding which Mr Spencer suggests was presumably based on the tribunal clerk's advice at the hearing. The second is the presumption of regularity, namely the rebuttable presumption that HMCTS did what it should have done (see e.g. R(CS) 1/00 at paragraph 16).

34. As to the latter question, Mr Spencer argues that the Appellant's convictions for fraud show a propensity for untruthfulness and that his word cannot be trusted (see *R v Brewster and Cromwell* [2010] EWCA Crim 1194 at paragraphs [19] and [20]).

The Upper Tribunal's analysis

35. On the balance of probabilities I am not satisfied that HMCTS forwarded the DWP's final response dated April 8, 2016 to the parties, and in particular to the Appellant. I reach that conclusion for the following reasons.

36. First, and crucially, there is no record on the Tribunal's record-keeping system GAPS2 of the DWP's final response ever having been issued to the parties. My understanding is that when a clerk issues further evidence (including a further submission), GAPS2 generates a series of customised cover letters for the Tribunal member(s) and the parties, drawing the relevant addresses from the database and 'populating' the standard letters accordingly, under standard letter template references GAPS 606/97 to GAPS 610/97. Even if no copies of such letters are placed on the hard copy file for the appeal, the (appropriately addressed and dated) individual letters are then saved to the computer records system and can be retrieved at a later date. There are, of course, several instances of "further evidence issued" in the GAPS2 record for the current appeals at earlier stages in the proceedings. However, in this case and over the relevant period there are only two types of letters

recorded as having been issued by the Tribunal: the letters notifying the hearing date (sent on April 19, 2016) and the covering letters issued with the Tribunal's decision notice on the day of the hearing itself (sent on May 18, 2016). No other correspondence is recorded as having been issued by the Tribunal in the period from and including April 8, 2016, the date of the DWP's final submission, up till the date of the hearing. From my understanding of how GAPS2 works, and on which I rely by way of judicial notice, it is simply not possible for further evidence to have been issued to the parties without a record appearing on the system.

37. Second, the contents pages for the Schedule of Evidence for the lead appeal lists the DWP's final submission but with a blank entry against this document in the column headed "Date of Issue". Mr Spencer argues that this is readily explicable simply by virtue of being a minor administrative oversight by the clerk. However, this does not explain why there is no record or copy letters on GAPS2 showing the document as having been issued. Mr Spencer also refers to the finding in the Tribunal's statement of reasons that the final response had been served on the Appellant. Even assuming the Tribunal was given that information by the tribunal clerk, as Mr Spencer suggests, the basis for this statement is wholly unclear, given there is no record on GAPS 2 and no hard copy record of its issue on the lead file. A further possibility which I can dismiss, and which I have not canvassed with the parties, is that the information about service was provided by the presenting officer at the hearing. However, this can be no more than speculation as (a) there is no note to that effect on the skeletal record of proceedings and (b) no indication of which address the submission would have been sent to in any event. Furthermore, once tribunal proceedings are under way the normal practice is for the DWP to send such documents to the Tribunal office which then numbers and issues them to all parties. Indeed, the final submission specifically and "respectfully" submitted to the Tribunal that the final response itself should "be accepted as notification of the decision issued to [the Appellant]" (p.1264), reinforcing my conclusion that it was not independently notified to him by the DWP. Moreover, that submission at p.1264 may well have led the District Tribunal Judge to *assume* it had been properly served.

38. Third, the Tribunal's own introductory comments in the statement of reasons (see paragraph 27 above) explicitly refer to "the supplementary submission provided by the Pensions Service *at the hearing*" (emphasis added). The statement of reasons goes on to add that this document "was not placed on the court file" and there was then a delay whilst it was located (and so before the statement of reasons was prepared). One would normally assume – the presumption of regularity – that a numbered document appearing in the appropriate numerical sequence in the appeal bundle and placed before the Tribunal's record of proceedings would have been on the file and located in that position and so before the Tribunal at the hearing. However, logically the submission "provided by the Pensions Service at the hearing" would not need to have been "placed on the court file", to use the language of the Tribunal's statement of reasons, if it had already been properly issued and so placed there. This further acts so as to rebut the presumption of regularity.

39. Fourth, there is the Appellant's e-mail of April 27, 2016 complaining that he had not received a copy of the DWP's further submission and so could not file his reply in time by his own deadline. I bear in mind Mr Spencer's argument about doubts as to the reliability of the Appellant's evidence. However, it is clear from the GAPS2 record that the Appellant was actively engaged with the Tribunal office during this period over e.g. arrangements for the date and venue for the hearing. Moreover, this is not simply a case of a claimant arguing long after the event, and rather conveniently, that he had never received a relevant document. Rather, this Appellant complained *at the*

time that he had not received the submission and so he would be unable to meet his own obligations under the Tribunal's timetable.

40. Finally, as well as interrogating GAPS2 I have, in a suitably inquisitorial spirit, conducted an extensive trawl through each of the three appeal files. There is no trace of any hard copy on any of those files of any letter or e-mail print-out (or even a compliments slip) accompanying the DWP's final response dated April 8, 2016, as one would normally expect. Thus it is entirely unclear to me whether the Tribunal office received a copy of the final submission in advance of the hearing and then a duplicate at the hearing, or possibly only received a copy at the hearing itself. Whatever the process adopted, I am satisfied and find as a fact that the Appellant was not sent a copy of the final submission before the hearing.

41. Thus, taking all those matters cumulatively into account, and for all those reasons, I am satisfied on the balance of probabilities and notwithstanding the presumption of regularity that the Tribunal received but did not forward the DWP's final submission to the Appellant.

Did the Appellant's non-receipt of the final submission make any difference?

The submissions on behalf of the Secretary of State

42. Mr Spencer submits that even if he is wrong about the issue of the DWP's final submission, it would not have made any material difference to the outcome of the appeal. He argues, based in part on information collated by the DWP during the proceeds of crime proceedings, that the Appellant "may have been living in Portugal for some time and concealing this fact from the DWP" (p.1317). Mr Spencer further contends that the Appellant's "seemingly deliberate failure to make the tribunal aware that he had moved to Portugal may well have ensured that even if the tribunal had issued a copy of the further submission to his last-notified postal address, it would not have arrived in time for him to respond to it before the hearing took place" (p.1436). On that basis, so it is said, the failure by the Tribunal office made no practical difference to the outcome – nothing of substance was lost and so there was no breach of natural justice.

The Upper Tribunal's analysis

43. I should perhaps start by noting that, as I advised the parties, my own scrutiny of the file and GAPS2 records shows that in November 2015 the Appellant informed the Tribunal office he was "in Portugal" but intended to return for a hearing, health issues permitting (p.1413). The Appellant had not notified the Tribunal office of an address in Portugal, instead relying on a series of c/o addresses in England.

44. I also recognise that under rule 13(5) the Tribunal "may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary" (Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685)). There is (quite obviously) no requirement that an appellant be permanently resident in the United Kingdom and certainly no bar on using a c/o address, even if the risks of doing so may fall on the appellant.

45. I am not persuaded by Mr Spencer's arguments on this aspect of the appeal either. We simply do not know what arrangements the Appellant had in place for official correspondence to be forwarded to him from a c/o address (e.g. by a family member). Nor can I say in all fairness that the Appellant had been concealing his whereabouts from the Tribunal. He may not have been entirely frank about the nature and duration of his presence in Portugal, for all I know, but he had complied with rule 13(5) and he had assiduously kept the Tribunal office up to date with changes in his

c/o address in the United Kingdom, as demonstrated by scrutiny of the GAPS2 records.

46. There is, in any event, a more fundamental point at stake here. As a result of my analysis above, I am satisfied on the balance of probabilities (in fact by a standard approaching sure beyond reasonable doubt) that the Appellant was not notified of the decisions of March 15 and 21, 2016 before the date of the Tribunal hearing on May 18, 2016. As Lord Steyn explained in *R v Secretary of State for the Home Department ex p Anufrijeva* [2003] UKHL 36 at paragraph [26]:

> "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system: *Raymond v Honey* [1983] 1 AC 1, 10G per Lord Wilberforce; *R v Secretary of State for the Home Department, Ex p Leech,* [1994] QB 198, 209D; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115."

47. So far as the Appellant was concerned in the run up to the Tribunal hearing, the DWP's position was as stated in its second full response and in the additional response dated October 30, 2015. He may or may not have agreed with all of those responses, but those were the background against which he presumably took the decision not to return to the United Kingdom for the hearing on May 18, 2016. There is, quite obviously, a world of a difference between an SPC overpayment liability of £11,369.59 and one of £31,423.44. The principle in *Anufrijeva* may be subject to modification in certain circumstances (see e.g. *Hamilton v Department for Social Development* [2010] NICA 46) but not in any way that affects the present case.

48. In a nutshell, the Tribunal heard and dismissed an appeal against a decision which had not been notified to the Appellant before the hearing. There was a clear breach of natural justice.

Disposal

49. Mr Spencer argues in favour of remittal to a fresh First-tier Tribunal if the appeal is allowed. The Appellant asks that I re-decide the matter, given my familiarity with the case and the length of time taken to date.

50. I do not consider it appropriate for me to re-determine the underlying appeal. The appeal requires proper fact-finding at first instance. The new First-tier Tribunal cannot proceed before it receives a coherent and comprehensible analysis by the Secretary of State as to (i) the amounts of SPC said to be overpaid for the relevant periods in relation to each appeal; and (ii) the amounts of SPC said to be recoverable for the relevant periods in question. Such analysis will need to explain how those figures have been calculated and how duplication of recovery across the three (or indeed five) appeals has been avoided. The Secretary of State's further submission should also explain how and why it differs from any earlier DWP submissions. For example, even having read the submission by TD dated April 8, 2016 several times, it is entirely unclear to me (a) how the figure of £31,423.44 had been arrived at and how it relates to the various individual appeals; and (b) why the Secretary of State has now resiled from the substantially lower overpayment figures contained in the second full response (and as explained at e.g. pp.512-513).

51. The new First-tier Tribunal will also need to consider the Appellant's various arguments on the facts (see e.g. pp.228, 962 and 1028). In particular, given the

Appellant's guilty pleas in the parallel criminal proceedings, the new Tribunal will need to be clear as to the issues on which the Appellant is disputing liability and the issues where he is disputing quantum (the amount) only. As regards the criminal convictions, the new Tribunal will doubtless bear in mind the guidance in *AM v Secretary of State for Work and Pensions (DLA)* [2013] UKUT 94 (AAC) and in *Newcastle City Council v LW (HB)* [2013] UKUT 123 (AAC).

Conclusion

52. I conclude that the decision of the First-tier Tribunal involves an error of law. Given my conclusions above, I do not need to deal with the Appellant's other grounds of appeal. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new Tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Postscript on case management matters

53. I cannot leave this decision without making a number of comments about the inter-section of the First-tier Tribunal's judicial and HMCTS's administrative processes in this case. In doing so I am acutely aware that those who live in glasshouses (the Upper Tribunal) should be wary of throwing stones at others in hothouses (the First-tier Tribunal). However, these points may have relevance to other cases and case management processes more generally.

54. The first and most obvious point is that it is entirely unsatisfactory that there should be such uncertainty about what happened to the DWP's final submission dated April 8, 2015. This was not a single sheet of paper that got mislaid somewhere along the line. It was a substantial document of over 20 printed pages which has appeared in the papers before the Upper Tribunal but with no satisfactory audit trail behind it.

55. The second and equally obvious point is that judicial directions are there for a purpose and should be observed by the Secretary of State as much as by any other party (see e.g. *BPP Holdings Ltd v Commissioners for Revenue and Customs* [2015] EWCA Civ 121 at paragraphs 37-39 and *Secretary of State for Work and Pensions v HS (JSA)* [2016] UKUT 272 at paragraph 18). The Secretary of State's response to the First-tier Tribunal's directions in the present case, for the most part, has been (at best) entirely cavalier. The Secretary of State can have no complaint about having been made subject to a draconian order barring him from further participation in the proceedings (see also the Supreme Court's decision in *BPP Holdings Ltd v Commissioners for Revenue and Customs* [2017] UKSC 55) and might count himself fortunate that the barring order was lifted.

56. The third point is that judicial rulings and directions need to be issued promptly by HMCTS. In the present proceedings a District Tribunal Judge made directions on May 7, 2015 with (yet another) warning notice that the DWP faced being barred from participating. HMCTS did not issue those directions until July 9, 2015, over two months later (see paragraph 15 above). Such a delay in relation to such an important set of directions is simply inexcusable. There will always be pressures of work and staff shortages within HMCTS but a system should have been in place to prioritise directions such as these. In the event this delay fortunately caused no real substantial injustice – other than adding to the already inordinate delays in the case.

57. The fourth is that judicial rulings and directions need to be set out in an appropriate format for the matter in question. The appropriate format will necessarily depend on the context. A duty judge granting or refusing a postponement may well

indicate as much in a hastily handwritten note on a referral sheet provided by a tribunal clerk. However, weightier matters require a more formal approach. In *London Borough of Camden v FG (SEN)* [2010] UKUT 249 (AAC) HH Judge Pearl held that a witness summons should be signed by a judge, rather than pp'd on her or his behalf (at paragraph 57). Similarly, at paragraph 30, Judge Pearl held that a ruling striking out a party's case (or barring a respondent from further participation) should be expressed:

> "in the form of an Order, be signed by the Judge who has made the decision rather than being pp'd on his or her behalf in the form of a letter, and specific reference be made to the fact that if the party concerned wishes to take matters further then an application must be made under Part 5 of the Rules (Correcting, setting aside, reviewing and appealing Tribunal decisions), and if any such decision under Part 5 goes against him or her, that an application must be made to the Upper Tribunal for permission to appeal on the basis of an arguable error of law (*Synergy Child Services Ltd v Ofsted* [2009] UKUT 125 (AAC)."

In the light of that guidance, I consider that the directions in relation to the DWP's reinstatement application should have been set out in judicial directions and signed by the judge, and not simply contained in a letter signed by a tribunal clerk (see paragraph 18 above).

58. Finally, the Tribunal must deal with the parties in an even-handed manner. According to GAPS2, the letter of October 16, 2015 containing directions for the DWP's reinstatement application was only sent to the Respondent. Not only should it have been issued in a more appropriate format, it should have been sent to the Appellant. He knew that the DWP had been barred from participating and was entitled to know that the DWP had made a reinstatement application. He may well have had something to say about that. It is a damning indictment of the processes adopted in this case that this Upper Tribunal decision may well be the first the Appellant has heard about both the DWP's letter of September 25, 2015 and the Tribunal's directions of October 16, 2015.

Signed on the original
on 10 August 2017

Nicholas Wikeley
Judge of the Upper Tribunal