IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001763-PIP**
ADMINISTRATIVE APPEALS CHAMBER **[2025] UKUT 1 (AAC)**

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

Secretary of State for Work and Pensions

Appellant

- v -

T.R.

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing dates: 13 February 2024 and 17 October 2024
Decision date: 2 January 2025

Representation:

Appellant:	Mr Jack Anderson of Counsel, instructed by the Government Legal Department (GLD)
Respondent:	Mr Martin Williams, Child Poverty Action Group (CPAG) (hearing 13 February 2024) Mr Tom Royston of Counsel, instructed by CPAG (hearing 17 October 2024)

DECISION

The decision of the Upper Tribunal is to allow the appeal by the Secretary of State. The decision of the First-tier Tribunal made on 30 December 2021 under file number SC242/21/02922 was made in error of law. The Upper Tribunal remakes the decision of the First-tier Tribunal as follows (Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) section 12(2)(b)(ii)):

> *The claimant's appeal is allowed.*
>
> *The decision made by the Secretary of State on 30/11/2017 in respect of entitlement to PIP is set aside.*
>
> *The claimant is not entitled to the PIP daily living component from 06/09/2017. She scores 2 points for daily living descriptor 4b (washing & bathing), which is insufficient to meet the threshold for the test.*
>
> *The claimant is entitled to the PIP mobility component at the standard rate from 06/09/2017 to 18/10/2018. She scores 10 points for mobility descriptor 1d.*

REASONS FOR DECISION

Introduction

1. This appeal concerns three decisions about a claimant's entitlement (or non-entitlement) to Personal Independence Payment (PIP). The outcome of this appeal ultimately depends on which decision was (or which decisions were) within the scope of the appeal to the First-tier Tribunal (FTT).

2. This case is also another example of how the already complex legislative provisions governing decision-making on social security appeals have been made more complicated still by their inter-section with the LEAP (Legal Entitlement and Administrative Practices) processes operated by the Department for Work and Pensions (DWP).

Preliminaries

3. The Secretary of State for Work and Pensions is the Appellant in the present Upper Tribunal appeal proceedings and the claimant is now the Respondent. Their roles were obviously reversed before the FTT. To avoid any potential for confusion, I refer to the parties in this decision as the Secretary of State and the claimant respectively.

4. I held a first oral hearing of the appeal on 13 February 2024. The Secretary of State was represented by Mr Jack Anderson of Counsel, instructed by the Government Legal Department (GLD), while the claimant was represented by Mr Martin Williams of the Child Poverty Action Group (CPAG). I then directed additional written submissions, resulting in a further oral hearing on 17 October 2024. Mr Anderson appeared again for the Secretary of State while on this occasion Mr Tom Royston of Counsel represented the claimant. I am grateful to all concerned for their helpful written and oral submissions.

An outline of what is agreed and what is not agreed between the parties

5. It is indisputable that the claimant made three claims to the DWP for PIP in 2017, 2018 and 2020, each of which was unsuccessful. What is not agreed between the parties is the scope of the claimant's subsequent FTT appeal in 2021 – was it solely concerned with her appeal against the (first) 2017 disallowance (as the Secretary of State argues) or were all three disallowed claims within scope of the appeal (as the claimant contends)?

A summary of the parties' positions

6. Therefore, the parties' respective positions on this appeal, stripped of complex nuances, may be summarised as follows.

7. The Secretary of State's position is that the 2021 FTT was concerned only with the claimant's appeal in relation to the disallowance of her 2017 claim, following a LEAP review. Mr Anderson submitted that the FTT had erred in law by allowing the claimant's appeal in respect of the 2017 claim but then failing to specify an end date to that award in circumstances where the claimant had (in 2018) made a second and unsuccessful application for PIP.

8. The claimant's position is that all three PIP claims, and not just the decision on the 2017 claim, were properly before the FTT on appeal in 2021. In any event, the decisions on the 2018 and 2020 claims had each involved official error and so the appeals against those disallowances were not late. As such, the FTT did

not err in law by making an open-ended award from the date in 2017 when PIP had first been claimed. In the alternative, if the decisions did not arise from official error, defects in the way those decisions had been notified meant that the claimant was in any event in time to apply for revision (or was entitled to bring appeals in respect of each decision without first seeking revision by way of a request for mandatory reconsideration).

The chronology of the three PIP claims in more detail

The 2017 claim

9. On 6 September 2017 the claimant applied for PIP ('the 2017 claim'). She listed her health conditions as ME/CFS, coeliac disease, anxiety and depression, sciatica and osteopenia. She submitted a PIP questionnaire on 4 October 2017 and underwent a medical assessment on 13 November 2017. On 30 November 2017 a DWP decision-maker decided the claimant scored no points for either daily living or mobility activities and so refused the claim. At the time, the claimant made no appeal.

The 2018 claim

7. On 19 October 2018 the claimant made a second claim for PIP ('the 2018 claim'). As before, she completed a PIP questionnaire (on 9 November 2018) and underwent a medical assessment (on 21 January 2019). As before, on 6 February 2019 a DWP decision-maker scored her at nil points in respect of both PIP components and so again refused the claim. As before, the claimant made no appeal at the time.

The 2020 claim

8. On 11 February 2020 the claimant made a third application for PIP ('the 2020 claim'). As before, she completed a PIP questionnaire (on 18 March 2020) and underwent a medical assessment (on 21 July 2020). As before, on 28 July 2020 a DWP decision-maker refused her claim, albeit finding on this occasion that the claimant scored 4 points for the 'moving around' mobility activity. This score was plainly insufficient to merit an award of PIP. As before, the claimant made no appeal at the time.

The First-tier Tribunal's decision in 2021

9. Following a mandatory reconsideration decision – the terms of which are important, and which I explore in more detail below – the FTT heard the claimant's appeal on 30 December 2021.

10. The FTT's decision notice, issued on the day of the hearing, recorded that the claimant's appeal was allowed and the DWP's decision of 30 November 2017 (namely, the disallowance of the first 2017 claim) was accordingly set aside. The FTT found that the claimant was not entitled to the PIP daily living component, scoring an aggregate of just 2 points for those activities. However, the FTT found the claimant was entitled to the mobility component of PIP, scoring 10 points for planning and following journeys (descriptor 1d: 'cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid'). The FTT stated in its decision notice that the claimant "is entitled to the mobility component at the standard rate from 06/09/2017. It is inappropriate to fix a term." That start date (6 September 2017) was, of course, the date of claim for the 2017 claim.

11. The FTT subsequently issued a full statement of reasons for its decision. It explained how it found the claimant to be a credible witness, finding that she exhibited overwhelming psychological distress when going to unfamiliar places such that mobility descriptor 1d applied. It also recorded that the claimant's entitlement in this respect was conceded by the DWP presenting officer who attended the hearing. The FTT further explained that, so far as the award of the mobility component was concerned, "it was inappropriate to fix an end date as her condition is unlikely to change" (statement of reasons at [32]). In conclusion, the FTT also referred somewhat elliptically to the DWP decision on the (third) 2020 claim as follows:

> [The claimant] will be entitled to enhanced mobility PIP from 28 July 2020 when she was awarded 4 points under activity 12(b) for being able to walk for 50 to 200 metres. We found it unclear when the enhanced award finished. That is a matter for the DWP.

12. The reasoning in the FTT's statement of reasons is undoubtedly (and at best) somewhat compressed. However, what is clear enough from the statement of reasons, as the District Tribunal Judge observed when giving the Secretary of State permission to appeal, is that "it appears the Tribunal proceeded on the basis that the whole period (i.e. the periods of award covered by the 3 DWP decisions) was in issue. It may be that the Tribunal treated [the claimant's] appeal as an appeal against all 3 DWP decisions."

The starting point

13. The starting point for understanding the FTT's jurisdiction is to go back to first principles, namely that the social security adjudication machinery is premised on decisions which are final, subject to the statutory processes of revision, supersession and appeal. Thus, by section 8 of the Social Security Act 1998 the Secretary of State makes decisions on claims for relevant benefits – which include PIP (see section 8(3)(baa), as amended). Such decisions may then be revised (section 9), superseded (section 10) or appealed (section 12).

14. The basic right of appeal is embodied in section 12(1) and (2), which provide as follows (so far as is material):

> 12.(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which—
>
> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
>
> (b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act.
>
> (2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal …

15. As a result of amendments made by the Welfare Reform Act 2012, the right of appeal has been made subject to the precondition that a claimant must first have requested a mandatory reconsideration from the Secretary of State by way of an application for a revision: see section 12(3A)-(3C).

16. It is also relevant in this context to note section 12(8), and in particular section 12(8)(b):

> (8) In deciding an appeal under this section, the First-tier Tribunal—
>
> (a) need not consider any issue that is not raised by the appeal; and
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

17. Section 17 further provides as follows (so far as is relevant) for the finality of decisions taken under this decision-making regime:

> (1) Subject to the provisions of this Chapter and to any provision 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.

18. The main effect of section 17(1) is to prevent there being two decisions in respect of the same benefit for the same person for the same period. The point is neatly illustrated by the decision of Commissioner Parker in *CSDLA/237/2003*. The claimant in that case had applied for disability living allowance (DLA) on 9 February 2001, a claim which was refused on 15 May 2001. He then made a further claim for DLA on 18 July 2002, which was likewise refused on 24 September 2002. The claimant's appeal against the first DLA disallowance decision was successful at a hearing on 26 November 2002, the tribunal awarding the lowest rate of the DLA component for the period from 9 February 2001 until 17 July 2002. The claimant appealed, arguing that the tribunal was wrong to have limited the period of the award to 17 July 2002.

19. In her decision dismissing the claimant's appeal, Commissioner Parker reasoned as follows (Mr Brown, referred to in this passage, appeared in that case for the Secretary of State):

> 10. The effect of s.17(1) is that decisions are final, subject to appeals, revisions or supersession, or judicial review. Therefore, the basic premise must be that the decision of the second DM on 24 September 2002 was final with respect to the question of entitlement from and including 18 July 2002, except insofar as it was subject to any of the judicial mechanisms above set out.
>
> 11. The second DM decision was not under appeal to the tribunal. Section 12(8)(b) has to be applied in conformity with s.17(1) and with the basic rule that there cannot be overlapping decisions in respect of the same benefit. If this were not the case, the current benefit position could be chaotic and the results would certainly not always benefit the claimant. In this case, the appellant might have been awarded higher rate mobility component and highest rate care component by the second DM for the period from 18 July 2002. It would be invidious if section 12(8)(b) permitted a tribunal to interfere with that decision and to extend its own award, of lowest rate care component only, into the period covered by the second award.
>
> 12. I agree with Mr Brown that "circumstances" is not apt to cover "decisions". There are two distinct stages. Firstly, a tribunal must decide the

> period over which it has jurisdiction to make an award. Usually, this is open ended if the adjudicating body considers that the facts justify entitlement on this basis. However, this is not so where a decision has already been made on a later period. Section 17(1) of the Social Security Act 1998, combined with fundamental legal principle, then curtails the period over which a body adjudicating as from an earlier date can extend its own award.

20. The same approach was taken by Commissioner Fellner in her decision in *CDLA/114/2004*. Echoing Commissioner Parker, she remarked (at paragraph 3) that "chaos would ensue if there were two separate decisions both dealing with the same, or partly the same, period, and it could be unfair to a claimant who did better, rather than, as here, worse under the second decision."

21. Much more recently, the same approach was adopted by Upper Tribunal Judge Hemingway in *GG v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 318 (AAC):

> 15. The effect of section 17(1), as explained in *CSDLA/237/03* (though the wording was slightly different at the date of the Commissioner's decision) is that decisions on claims are final, subject to appeals, revisions, supersession or judicial review. As was also explained by the Social Security Commissioner, section 12(8)(b) has to be applied in conformity with section 17(1) and with the basic rule that there cannot be overlapping decisions in respect of the same benefit. As was pointed out, if that were not the case the situation "could be chaotic". So, as the Commissioner went on to explain, a F-tT must decide the period over which it has jurisdiction to make an award. This will usually be open ended. But where a decision has already been made on a later period section 17(1) along with the commonsense principle that there cannot be two or more overlapping decisions concerning the same period, operates to limit the period over which a decision-making body has jurisdiction.
>
> 16. So, it follows that where the F-tT is adjudicating upon an earlier decision concerning a claim for benefit and the Secretary of State has made a later decision on a later claim for the same benefit (as here), then, perhaps absent something wholly exceptional, the period over which the F-tT has jurisdiction is only up to the date immediately prior to the second decision.

22. It follows – and quite possibly contrary to the reasonable expectations of many appellants – that the main focus of the benefits adjudication machinery is on the decision under appeal rather than on the individual who is bringing that appeal. As I observed in *GJ v Secretary of State for Work and Pensions (PIP)* [2022] UKUT 340 (AAC) (and see to similar effect *KK v Secretary of State for Work and Pensions (PIP)* [2023] UKUT 151 (AAC) at paragraphs 4-9):

> 10. The Appellant's statement in his notice of appeal in 2020 that "the appeal has been going on since May 2017" needs to be unpacked a little. It is entirely understandable that he sees the question of his entitlement to PIP as being a single discrete issue starting with his original claim for benefit. However, the benefits appeals system takes a different approach, which focusses more on specific decisions than just on the claimant as an individual. Mr Commissioner Powell explained the decision-based system in the unreported Social Security Commissioner's decision *CA/1020/2007* (at paragraph 12) as follows:

> "What is meant by this is that the system proceeds, or is based, on formal decisions being given. If a benefit is awarded it must be awarded by a formal and identifiable decision. If that decision is to be altered by, for example, increasing or decreasing the amount involved, it can only be done by another formal and identifiable decision. Likewise a decision is required if the period of the award is to be terminated, shortened or extended."

23. In the present appeal neither Mr Williams (at the first hearing of the Upper Tribunal appeal) nor Mr Royston (at the second hearing), both appearing on behalf of the claimant, sought to challenge this line of authority. It follows that if this was a straightforward case, with the 2021 FTT indisputably seised only of the claimant's appeal against the disallowance decision on her 2017 claim, then they would accept that the period under consideration was constrained by the start date for the DWP's adverse decision on the subsequent 2018 claim.

24. However, Mr Williams and Mr Royston submitted that this was not such a straightforward case. Their core submission was that the FTT had the jurisdiction to make an award for an indefinite period from 6 September 2017 because the claimant had made a valid appeal against all three PIP decisions. This was, they said, because the claimant had made timely revision requests in relation to all three decisions – timely because the decisions all arose from official error and so were susceptible to any time (rather than any grounds) revision. In the alternative, if not all the decisions arose from official error, there were defects in the Secretary of State's notification of the decisions such that time had not started to run and so the requests were necessarily in time. Finally, in the further alternative, it was argued that the claimant was entitled to bring appeals in respect of each decision without first seeking revision by way of a mandatory reconsideration. Thus, they argued, all three PIP decisions were within the scope of the claimant's appeal because of the route taken to arrive at the FTT. This route therefore needs to be examined.

The claimant's route to the First-tier Tribunal

25. The claimant's first PIP claim was made on 6 September 2017. In the decision letter dated 30 November 2017, disallowing that claim, the decision-maker stated:

> I've looked at your claim and decided:
>
> · at this time I can't award you PIP for help with your daily living needs from 6 September 2017
>
> · at this time I can't award you PIP for help with your mobility needs from 6 September 2017

26. The decision letter added that "If you disagree with our decision you can ask us to look at it again. You must do this within **one month** of the date of this letter." As is evident from the chronology above, the claimant did not pursue that option (at least at that time), instead making further (unsuccessful) PIP claims in October 2018 and February 2020. Meanwhile, however, the DWP had been considering how to respond to two Upper Tribunal decisions on test cases concerning the eligibility criteria for PIP, namely *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12 ('*MH*') and *RJ, GMcI and CS v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 105 (AAC); [2017] AACR 32 ('*RJ*').

27. In the first of these cases, *MH*, a decision promulgated on 28 November 2016, the Upper Tribunal decided that a person who experienced overwhelming psychological distress could potentially score points for the purposes of mobility activity 1 for being unable to follow the route of a journey. The second decision, *RJ*, a case decided on 9 March 2017, considered the concept of safety in the context of the PIP eligibility criteria. On the facts of the claimant's case, it was only *MH* that was potentially relevant to her circumstances.

28. In June 2018 the DWP published new guidance for its decision-makers on how to apply *MH*. As the previous guidance had been deficient, in the same month the DWP launched a LEAP exercise, reviewing previous PIP decisions which may have been affected by *MH*. The scope of the LEAP review was limited to decisions which had been taken before the publication of the new guidance, as in principle these were the only decisions that could have been adversely affected by the old guidance. The official position was explained in the DWP policy paper *PIP administrative exercise: progress on cases cleared, at 30 November 2022* (15 December 2022) (see https://www.gov.uk/government/publications/pip-administrative-exercise-progress-on-cases-cleared-at-30-november-2022):

> Since 25 June 2018, the department has been carrying out an administrative exercise looking at claimants who were entitled to PIP on the date of the Upper Tribunal decisions to review whether these changes mean they are eligible for more support under PIP. The department is also looking at claims on or after the dates of the Upper Tribunal decisions, up until the department implemented the decisions into its decision-making processes.

29. Pausing there, it is to be noted that all three of the claimant's PIP claims were made (and so necessarily decided) after the dates of the judgments in the Upper Tribunal cases of *MH* and *RJ*. However, only the first PIP claim (in 2017) was decided before the DWP had issued its new guidance (in June 2018) on the implementation of the test case decisions. That new guidance had been in force for about 8 months by the time the second 2018 claim was refused.

30. Approximately a year after the third 2020 claim had been refused, the DWP sent the claimant a letter on 4 June 2021 headed 'Personal Independence Payment: Changes in PIP law'. Although it does not use the (admittedly unhelpful) LEAP terminology, both parties are agreed that the letter was prompted by that review. In passing I observe that the letter of 4 June 2021 was not actually in the papers before the FTT, and it is only thanks to the claimant that a copy has appeared in the Upper Tribunal bundle. The material parts of the letter read as follows (emphasis in bold as in the original):

> There have been some changes in Personal Independence Payment (PIP) law that affect how the Department for Work and Pensions decides PIP claims.
>
> **The main health conditions we have for you on our system indicate your PIP claim(s) are not affected by these changes.**
>
> The changes are to do with:
>
> • how overwhelming psychological distress is considered when assessing someone's ability to plan and follow a journey. Overwhelming psychological distress is distress related to a severe mental health condition, intellectual

> or cognitive impairment. It may result in a person being unable to complete a journey
>
> • how we decide whether someone can carry out an activity safely and if they need supervision. We now consider the seriousness of any harm that might happen as the likelihood of it happening
>
> **Who is likely to be affected**
>
> The people affected by these changes will most likely have a severe:
>
> • cognitive impairment
>
> • intellectual impairment
>
> • developmental impairment, or
>
> • mental health condition
>
> Or a condition affecting the brain and nervous system with symptoms such as:
>
> • blackouts
>
> • fits, or
>
> • faints with loss of consciousness
>
> If you think your PIP claim(s) could be affected by these changes, please phone or write to us using the details on the front page of this letter. If we need more information from you, we will contact you to request this. If you do not currently have a PIP claim or award and your circumstances have changed you may need to make a new claim.

31. On 15 June 2021 the claimant, taking up the suggestion at the start of the final paragraph above, telephoned the DWP to make what was treated as a request for a mandatory reconsideration (MR) of the decision communicated in the letter of 4 June 2021. DWP records state simply "T/c [telephone call] from claimant - segmentation call, explanation given claimant would like further explanation/MR as has cognitive impairment. MR registered under *MH*."

32. On 25 June 2021 the DWP duly sent the claimant a mandatory reconsideration notice. The key passage in that notice read as follows:

> Thank you for asking us to look at your Personal Independence Payment (PIP) again.
>
> I have looked at your PIP and decided:
>
> - at this time I cannot award you PIP for help with your daily living needs from 06 September 2017
> - at this time I cannot award you PIP for help with your mobility needs from 06 September 2017
> - The decision made on your claim on 30/11/2017 is unaffected by the changes in PIP law. You will find details of this in my decision below.
> - The decisions made on 06/02/2019 and 28/07/2020 are unaffected by the changes in PIP law as these would have already been considered.

33. On 16 August 2021 the claimant filed a 'Benefit appeal form' (SSCS1 PIP/ESA/UC), citing the mandatory reconsideration notice dated 25 June 2021. In the box provided for setting out her reasons for appealing, the claimant wrote (in summary):

> The reasons for my appeal is that I'm affected by several activities on a daily basis. (1) I am unable to leave the house … (2) communicating with people is difficult because of my concentration… (3) I have problems reading information… (4) mixing with other people causes a lot of anxiety… (5) budgeting decisions have to be very simple…

34. The DWP's written response to the claimant's appeal made clear its view that the scope of the appeal was limited to the 2017 claim. Thus, the response stated that the date of claim was 6 September 2017, the outcome decision was dated 30 November 2017 and the reconsideration decision was on 25 June 2021. In terms of the sequence of the decision-making history, the DWP's response to the claimant's appeal provided the following summary:

> **Section 3: The decision under appeal**
>
> Decision under appeal dated 30/11/2017.
>
> [The claimant] scores **0 points** for Daily Living and **0 points** for Mobility so isn't entitled to Personal Independence Payment at either rate for the Daily Living component or Mobility component from and including 06/09/2017.
>
> An Administrative Exercise review was completed on 25/06/2021 and did not change the original decision dated 30/11/2017.
>
> **Further Decision(s)**
>
> [The claimant] scores **0 points** for Daily Living and **0 points** for Mobility so isn't entitled to Personal Independence Payment at either rate for the Daily Living component or Mobility component from and including 19/10/2018.
>
> [The claimant] scores **0 points** for Daily Living and **4 points** for Mobility so isn't entitled to Personal Independence Payment at either rate for the Daily Living component or Mobility component from and including 11/02/2020.

35. Plainly, therefore, it was the DWP's understanding that the FTT was solely concerned with the claimant's appeal against the DWP's decision on the first 2017 claim and not the decisions on the subsequent 2018 and 2020 claims. These were the 'Further Decisions', reference to which had in effect been included for information only.

36. Focussing for the moment just on the claimant's 2021 challenge to the decision on her 2017 claim, an obvious point arises as to time limits. By the time that the claimant made her mandatory reconsideration request (on 15 June 2021), more than 13 months had elapsed since the date of the DWP's original decision on her 2017 claim (30 November 2017). As such, the claimant was outside the absolute time limit for seeking an 'any grounds' revision of the decision on the 2017 claim (see regulations 5 and 6 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381); 'the Decisions and Appeals Regulations 2013'). But the claimant had to have made an application for revision of the relevant decision before her right of appeal crystallised

(regulation 7 of the Decisions and Appeals Regulations 2013). Accordingly, her request could succeed only if she fell within one of the circumstances permitting an 'any time' revision – in practice, on the basis of official error (regulations 8 and 9(a) of the Decisions and Appeals Regulations 2013). The time for appealing to the FTT then ran from the date of the mandatory reconsideration notice (see *PH and SM v Secretary of State for Work and Pensions (DLA)(JSA)* [2018] UKUT 404 (AAC); [2019] AACR 14 at paragraphs 13 and 21).

37. Recapping on the central thrust of the parties' respective submissions, the Secretary of State and the claimant were agreed that the LEAP decision letter, the mandatory reconsideration request and the mandatory reconsideration notice were all concerned with the DWP's decision on the first PIP claim in 2017. The fundamental difference between them was that Mr Anderson submitted that was all they were concerned with, whereas Mr Williams and Mr Royston contended that those various decision-making stages also encompassed consideration of the 2018 and 2020 claims. It is therefore important to consider each step in the proceedings in turn. This was the prime focus of the first Upper Tribunal oral hearing.

38. What then of the LEAP decision letter of 4 June 2021? Mr Williams submitted that there was no indication on the face of the letter that it was solely concerned with the decision on the first claim. Rather, he argued, the more natural reading was that the DWP had looked at all of the claimant's applications for PIP. On his analysis the use of the formulation "claim(s)" – as in "**The main health conditions we have for you on our system indicate your PIP claim(s) are not affected by these changes**" – carried the implication that, where there were decisions on more than one claim, all the claims had been considered. The overall difficulty with this construction is that it involves reading the letter in relative isolation. It completely ignores the context, namely that the LEAP review involved looking at decisions which were taken at a time when DWP staff were labouring under a misapprehension as to the true position under PIP law – i.e. decisions that had been taken before the DWP issued its new guidance on the test cases in June 2018. Mr Williams' reliance on the reference in the contingent plural to "claim(s)" takes him no further – read in context, this must refer to that claim or those claims that fell within the scope of the LEAP exercise.

39. What then of the mandatory reconsideration request of 15 June 2021? We do not know exactly what was said, but Mr Williams submits that the note of the telephone call is best interpreted as the claimant phoning to say she thought *all* of the decisions about her entitlement to PIP were wrong. I accept it is entirely possible that that was indeed her view, but an individual's subjective belief as to what is in issue does not define the parameters of a DWP decision taken under a complex statutory decision-making regime. The claimant's telephone call was in response to the DWP's letter of 4 June 2021 and that communication was in substance confined to the decision on the first claim (see above). The call-handler's note as to *MH* referred to the Upper Tribunal's decision in the relevant test case and that in turn tied it back to the 2017 claim, as it was only the 2017 claim that was affected by the LEAP exercise. It follows that looked at objectively, and bearing in mind the context, the claimant's request was necessarily confined to the decision on the 2017 claim.

40. What then of the mandatory reconsideration notice of 25 June 2021? Mr Williams submits that the notice purportedly refused to revise all three PIP decisions. His

argument, in essence, is that the text of the notice is sufficient to show that the decisions on the latter two PIP claims were also considered by the decision-maker with a view to possible revision. However, the notice makes a clear distinction between "the decision made on your claim on 30/11/2017 [which] is unaffected by the changes in PIP law" and "the decisions made on 06/02/2019 and 28/07/2020 [which] are unaffected by the changes in PIP law as these would have already been considered". I do not accept Mr Williams's submission that the latter formulation connoted a refusal to revise the two decisions in question. Rather, that formulation involves a recognition that the decisions do not fall in the same ballpark for consideration, not least as they were not covered by the decision in the letter of 4 June 2021, that being concerned solely with the 2017 claim. In effect, the latter two decisions were being noted for the purposes of completeness, and not because they had been subject to any form of reconsideration. It is noteworthy that in the detailed narrative under the heading 'My decision' the decision-maker makes no reference to the 2018 and 2020 claims, explaining that "the decision dated 30 November 2017 was looked at again taking into consideration the 2 tribunal judgements [*sic*] detailed below".

41. What then of the claimant's notice of appeal dated 16 August 2021? It is true that this is written in the present tense, indicating that the claimant was seeking to establish her current entitlement to benefit. It is entirely understandable that she should focus on her current entitlement rather than on the details of particular past periods of entitlement. However, the point remains that a claimant's subjective perception as to the scope of an appeal is not determinative – in a decision-based adjudication regime that scope is dependent on the nature of the relevant decision under challenge.

42. Standing back to take stock, the LEAP letter of 4 June 2021, which kickstarted the present appeal, undoubtedly has its deficiencies, not least that it does not actually specify in terms which PIP decision has been looked at. However, given the context, an objective reading of that letter is that it was solely concerned with the decision on the 2017 claim. It follows in particular that the claimant's request for a mandatory reconsideration on 15 June 2021, prompted in turn by that decision, was on any proper analysis likewise confined to the 2017 claim. The mandatory reconsideration notice of 25 June 2021 and the claimant's subsequent appeal dated 16 August 2021 were likewise restricted to the 2017 decision that had been revisited as part of the LEAP exercise. As there was no valid request for a reconsideration of either of the two later PIP decisions, the FTT's jurisdiction was limited by the parameters of the first claim in 2017. That conclusion is sufficient in itself to dispose of the claimant's submissions designed to uphold the FTT's unlimited award on alternative grounds.

Provisional conclusion on the decision of the First-tier Tribunal

43. On the face of it, therefore, the FTT on 3 December 2021 accordingly erred in law. It lacked jurisdiction to hear any appeal against the DWP's decisions on the second and third PIP claims. It should not have made an unlimited award of the standard rate of the mobility component. Instead, its jurisdiction was limited to the period covered by the DWP's decision on the first claim, namely the period from 6 September 2017 (the date of claim for the first claim) to 18 October 2018 (the day before the date of claim for the second claim). I therefore propose to set aside the decision of the FTT dated 3 December 2021 (TCEA 2007 section 12(2)(a)). There has been no challenge by the Secretary of State to the substance of the

FTT's decision (as opposed to the period of the award) and indeed the claimant's entitlement to the standard rate of the mobility component was conceded at the FTT hearing by the presenting officer. In those circumstances there is no point in remitting the appeal to the FTT for a fresh re-hearing. Rather, the Upper Tribunal can re-make the decision originally under appeal (TCEA 2007 section 12(2)(b)(ii)). The substituted decision is as follows:

> *The claimant's appeal is allowed.*
>
> *The decision made by the Secretary of State on 30/11/2017 in respect of entitlement to PIP is set aside.*
>
> *The claimant is not entitled to the PIP daily living component from 06/09/2017. She scores 2 points for daily living descriptor 4b (washing & bathing), which is insufficient to meet the threshold for the test.*
>
> *The claimant is entitled to the PIP mobility component at the standard rate from 06/09/2017 to 18/10/2018. She scores 10 points for mobility descriptor 1d.*

44. It will be recalled that the central submission advanced on behalf of the claimant was that the FTT had jurisdiction to make an award for an indefinite period with effect from 6 September 2017 (and so, contrary to my primary finding above, did not err in law). This was, so it was said, because the claimant had lodged a valid in-time appeal against all three PIP decisions. I heard extensive oral argument on the assumption that on 15 June 2021 the claimant had made revision requests in relation to all three decisions. In deference to those submissions, and lest I am mistaken as to my primary finding, I proceed to consider the position on that same basis. This requires consideration of the claimant's submission that any such requests were in time as the DWP's decisions in question arose from 'official error' and so were accordingly susceptible to any time revision under regulation 9 of the Decisions and Appeals Regulations 2013.

The official error issue

The meaning of 'official error'

45. Regulation 9(a) provides that a decision may be revised where it "arose from official error". Regulation 2 provides a partial definition of "official error" by reference to the type of actor involved in perpetrating the error and by excluding errors of law which have been shown to be such by a subsequent decision of the Upper Tribunal or a relevant court. However, beyond that regulation 2 is silent as to what actually constitutes an "official error", meaning the scope of the concept has had to be worked out incrementally in the case law.

46. In the context of the usage of the term under the housing benefit scheme, Commissioner Howell QC referred to "the kind of 'mistake' envisaged by the wording used in this regulation, which is a 'clear and obvious' error of fact or law made by some officer on the facts disclosed to him, or which he had reason to believe were relevant" (*R(H) 2/04* at paragraph 13). Likewise, Commissioner Levenson ruled as follows in *CPC/206/2005*:

> 23. It seems to me that the concept of "error" involves more than merely taking a decision that another decision maker with the same information would not take, but is not limited to (although it includes, subject to the statutory exceptions) a public law or any other error of law. Other than that

it is not helpful (and could be misleading) to go beyond the words of the regulation.

47. The question then is whether either of the DWP decisions on the 2018 and 2020 claims respectively was infected by official error. There is, however, a prior question which arises for consideration in the present appeal. This is that the claimant contends that it does not matter whether a revision request implicitly or expressly identifies official error (or indeed any other ground) as a ground for revision. In the alternative, the claimant submits that she did in fact implicitly request revision on the ground of official error.

Must a request expressly or implicitly identify official error as a ground for revision?

48. Upper Tribunal Judge Poole QC (as she then was) decided in *PH and SM v Secretary of State for Work and Pensions (DLA)(JSA)* [2018] UKUT 404 (AAC); [2019] AACR 14 that, in cases where a request for mandatory reconsideration was made after the maximum period of 13 months from the original decision, the FTT only has jurisdiction to hear an appeal in limited categories of case – principally where the substance of the mandatory reconsideration request is official error. Furthermore, where the FTT has jurisdiction, then the claimant must comply with the limitation periods in the FTT procedural rules. Accordingly, in cases subject to mandatory reconsideration, any appeal should be brought within one month of the date of notification of the result of the mandatory reconsideration (unless an extension is granted, the maximum extension being 13 months from the date of notification of the result of the mandatory reconsideration).

49. Judge Poole summed up her analysis as follows (the references to the relevant regulations are to those that applied in the pre-2013 regime but in substance the effect is the same now under the Decisions and Appeals Regulations 2013):

> 12. The effect of this discussion is that First-tier Tribunals do not have jurisdiction to hear appeals where applications for mandatory reconsideration fall within Regulations 3(1) and 3(3) of the 1999 Regulations (any ground requests and requests about payments from the social fund in respect of maternity or funeral expenses) and they are late (ordinarily later than 13 months after the original decision of the SSWP, subject to small variations depending on the timing of written reasons). However, tribunals do have jurisdiction to hear appeals in cases where the mandatory reconsideration request is made after 13 months from the original decision in limited categories within Regulation 3(5), which include official error (as defined in Regulation 1). Accordingly, in cases where jurisdiction is in issue, First-tier Tribunals will have to consider whether a request for mandatory reconsideration is an "any ground" revision request (within Regulations 3(1) or 3(3) where jurisdictional time limits will apply) or an "any time" request (within Regulation 3(5). What is important is the substance of the request. The tribunal is not bound by parties' classification as "any ground" or "any time". Further, if an "any time" request advances no arguable case of official error and is spurious, there may be scope for the tribunal to find there has been no properly constituted "application to revise" for official error within the meaning of Regulation 3ZA of the 1999 Regulations, so there is no jurisdiction to hear an appeal, by application of Section 12(3A) of the 1998 Act (cp *Wood v SSWP* [2003] EWCA Civ 53). But in appropriate cases, tribunals will have jurisdiction to hear appeals, even if an application for

> mandatory reconsideration on the basis of official error was made more than 13 months after the original decision.

50. It follows that in such circumstances the agreed effect of Judge Poole's decision is that two features must be present in order for a right of appeal to have arisen. First, the application must be in substance an application for revision on the ground of official error. Second, the decision under challenge must actually have been made in consequence of an official error. However, it was argued on behalf of the claimant that the first of these requirements misstated the correct legal position (it was accepted that the second requirement reflected the true position). I do not propose to explore those arguments in any detail – the decision in *PH and SM v SSWP (DLA)(JSA)* [2018] UKUT 404 (AAC); [2019] AACR 14, being reported in the Administrative Appeals Chamber Reports (AACR), is one that commanded the broad assent of the majority of the salaried judiciary in the Chamber and so carries added precedential weight, even if not technically binding on me. It has also been followed in a broad swathe of other decisions in the Chamber (see notably e.g. *DB v Secretary of State for Work and Pensions* [2023] UKUT 95 (AAC)). I also bear in mind that the request for revision need not be expressed in technical language.

51. Even making due allowances in that regard, it seems to me there is some force in Mr Anderson's submission that the claimant's request in the present case cannot be said to raise any issue of official error, whether explicitly or implicitly. However, I need not fully resolve that issue given the primary focus of the parties' submissions concerned the question of whether official error had been established on the facts in relation to the decision on either the 2018 claim or the 2020 claim.

The DWP's decision on the 2018 claim and official error

52. Assuming that a request for revision on the basis of official error had been made, the claimant's case is that the DWP decision-maker failed to have any regard or any proper regard to a letter from the GP dated 28 November 2017 which the claimant had provided. This failure, it is submitted, amounted to official error.

53. The substance of the GP's letter of 28 November 2017 read as follows (with the passage relied upon by the claimant now italicised):

> A summary of this lady's medical history is below. *Her chronic fatigue syndrome and anxiety lead her to feel particularly overwhelmed and this affects her concentration on tasks and engagement socially.* She in under gastroenterology for her coeliacs disease and has recently been diagnosed with osteopenia as a result of this. Perncicious [*sic*] anaemia can also cause tiredness, low energy poor concentration and shortness of breath.

54. That short paragraph in the GP's letter was then followed by a brief list of medical conditions with the date of first diagnosis indicated in each case.

55. It is perfectly true that there is no mention of the GP letter in the disallowance decision dated 6 February 2019 on the 2018 claim. However, this does not mean that it was disregarded. At the very outset of the decision, the decision-maker stated that "I looked at all of the information available to me, <u>including</u> the 'How your disability affects you' form" (<u>emphasis added</u>). Indeed, arguably the key word there is "including" – the PIP2 form was evidently not the only document consulted, as the decision-maker subsequently referred to various of the detailed

findings in the HCP's assessment. The GP's letter was plainly part of the information available to the decision-maker and the absence of any express mention of the letter does not mean it was not considered, not least as there is no requirement to itemise every single piece of evidence considered. Furthermore, and in any event, I agree with Mr Anderson's submission that the GP's letter is cast in very general terms and is vague and unparticularised about the extent to which the PIP activities are affected. The decision-maker was entitled to place greater weight on the more detailed HCP assessment, and the omission of any specific reference to the GP letter is some considerable way short of indicating "a 'clear and obvious' error of fact or law made by some officer on the facts disclosed to him", to use the formulation derived from *R(H) 2/04*.

56. There was, therefore, no official error in the course of the determination of the 2018 claim for PIP.

The DWP's decision on the 2020 claim and official error

57. The position in relation to the decision on the 2020 claim is different. In the course of the current Upper Tribunal proceedings the Secretary of State has acknowledged that the decision on the 2020 claim involved an element of official error. In a written submission made after the first Upper Tribunal hearing, Mr Anderson reported the Department's recognition that "on reflection … that decision does not engage adequately with the evidence presented, in particular in respect of the Respondent's need for rests and the extent to which that affects mobility activity 2". The Secretary of State accordingly "considers it appropriate to revise that decision pursuant to regulation 9(a)". The resulting revision decision will presumably generate its own appeal rights.

58. The claimant makes two points by way of response. The first is that any revision by the Secretary of State of the decision on the 2020 claim is necessarily dependant on that aspect of the FTT decision being set aside, given that the Secretary of State cannot revise an extant FTT decision. The second is that the Secretary of State's concession makes little difference in practice. This is because the parties were now agreed that the revision application in issue was in fact made within 13 months of the decision on the 2020 claim. That being so, as long as the claimant's application was sufficiently broad to encompass a challenge to the 2020 decision then the revision could equally be conducted under regulation 5(1), time being extended as necessary under regulation 6.

The notification issue

59. Finally, in the event that not all the decisions arose from official error, the claimant has a further alternative submission by which to ground the FTT's jurisdiction. This submission is that there were defects in the Secretary of State's notification of the decisions such that the claimant was nevertheless in time to apply for revision (or, in the further alternative, was entitled to bring appeals in respect of each decision without first seeking revision). In summary, Mr Williams and Mr Royston's submission was that the one-month time limit for seeking revision was inapplicable because (a) the time limit runs only when a regulation 7 written notice is given; (b) a regulation 7 written notice "must" inform the recipient of the various matters prescribed in regulation 7(3)(a); but (c) the Secretary of State's communications of the decisions in question did not properly inform her of the matters so prescribed in regulation 7(3)(a).

60. I must start with the relevant legislative provisions. Chapter 1 of Part 2 of the Decisions and Appeals Regulations 2013 is concerned with 'Revision on any grounds' (in contradistinction to Chapter 2, which deals with 'Revision on specific grounds', including regulation 9 on official error). Chapter 1 comprises three interlocking regulations; regulation 5 (revision on any grounds), regulation 6 (late application for a revision) and regulation 7 (consideration of revision before appeal).

61. Regulation 5(1) provides as follows (paragraph (2) sets out certain exceptions to paragraph (1) which are not relevant for present purposes):

> **Revision on any grounds**
>
> **5.**—(1) Any decision of the Secretary of State under section 8 or 10 of the 1998 Act ("the original decision") may be revised by the Secretary of State if—
>
> (a) the Secretary of State commences action leading to the revision within one month of the date of notification of the original decision; or
>
> (b) an application for a revision is received by the Secretary of State at an appropriate office within—
>
> (i) one month of the date of notification of the original decision (but subject to regulation 38(4)(correction of accidental errors));
>
> (ii) 14 days of the expiry of that period if a written statement of the reasons for the decision is requested under regulation 7 (consideration of revision before appeal) or regulation 51 (notice of a decision against which an appeal lies) and that statement is provided within the period specified in paragraph (i);
>
> (iii) 14 days of the date on which that statement was provided if the statement was requested within the period specified in paragraph (i) but was provided after the expiry of that period; or
>
> (iv) such longer period as may be allowed under regulation 6 (late application for a revision).

62. Regulation 6 (as amended) then provides as follows:

> **Late application for a revision**
>
> **6.**—(1) The Secretary of State may extend the time limit specified in regulation 5(1) (revision on any grounds) for making an application for a revision if all of the following conditions are met.
>
> (2) The first condition is that the person wishing to apply for the revision has applied to the Secretary of State at an appropriate office for an extension of time.
>
> (3) The second condition is that the application—
>
> (a) explains why the extension is sought;
>
> (b) contains sufficient details of the decision to which the application relates to enable it to be identified; and

(c) is made within 12 months of the latest date by which the application for revision should have been received by the Secretary of State in accordance with regulation 5(1)(b)(i) to (iii).

(4) The third condition is that the Secretary of State is satisfied that it is reasonable to grant the extension.

(5) The fourth condition is that the Secretary of State is satisfied that due to special circumstances it was not practicable for the application for revision to be made within the time limit specified in regulation 5(1)(b)(i) to (iii) (revision on any grounds).

(6) In determining whether it is reasonable to grant an extension of time, the Secretary of State must have regard to the principle that the greater the amount of time that has elapsed between the end of the time limit specified in regulation 5(1)(b)(i) to (iii) (revision on any grounds) and the date of the application, the more compelling should be the special circumstances on which the application is based.

(7) An application under this regulation which has been refused may not be renewed.

63. Finally in Chapter 1, regulation 7 provides as follows:

Consideration of revision before appeal

7.—(1) This regulation applies in a case where—

(a) the Secretary of State gives a person written notice of a decision under section 8 or 10 of the 1998 Act (whether as originally made or as revised under section 9 of that Act); and

(b) that notice includes a statement to the effect that there is a right of appeal in relation to the decision only if the Secretary of State has considered an application for a revision of the decision.

(2) In a case to which this regulation applies, a person has a right of appeal under section 12(2) of the 1998 Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of that Act.

(3) The notice referred to in paragraph (1) must inform the person—

(a) of the time limit under regulation 5(1) (revision on any grounds) for making an application for a revision; and

(b) that, where the notice does not include a statement of the reasons for the decision ("written reasons"), the person may, within one month of the date of notification of the decision, request that the Secretary of State provide written reasons.

(4) Where written reasons are requested under paragraph (3)(b), the Secretary of State must provide that statement within 14 days of receipt of the request or as soon as practicable afterwards.

(5) Where, as the result of paragraph (2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 9 of the 1998 Act.

64. In summary, the claimant's submission runs as follows. Regulation 7 of the Decisions and Appeals Regulations 2013 specifies that notification of a decision where mandatory reconsideration applies must include the time limit for revision on any grounds. In particular, regulation 7(3)(a) provides that the notification must inform the claimant "of the time limit under regulation 5(1) (revision on any grounds) for making an application for a revision". Regulation 5(1) then actually sets out a series of time limits, each depending on the particular circumstances – see regulation 5(1)(b)(i)-(iv). The last of these (regulation 5(1)(b)(iv)) is "such longer period as may be allowed under regulation 6 (late application for a revision)". Accordingly, it is argued, the possibility under regulation 6 for an extension of the time in which to seek revision is therefore, because it is referred to in regulation 5(1), also part of what must be notified to a claimant in order to comply with regulation 7(3)(a).

65. The text that the decision letter (e.g. that dated 28 July 2020) actually includes is as follows:

> **If you disagree with a decision**
>
> **You can ask us to explain why**
>
> You, or someone who has the authority to act for you, can phone or write to us within one month of the date on this letter to ask us to explain our decision.
>
> **You can ask us to reconsider a decision**
>
> Tell us if you have more information, or if you think we have overlooked something which might change the decision. Do this within one month of the date on this letter.
>
> We will look at what you tell us and send you a letter to tell you what we have decided, and why. We call this letter a Mandatory Reconsideration Notice.
>
> **When you have done this you can appeal**
>
> If you disagree with the Mandatory Reconsideration Notice, you can appeal to a tribunal. You must wait for the Mandatory Reconsideration Notice before you start an appeal.

66. As such, the information in the decision letter is silent about the possibility of a late application for a revision. Criticism was targeted in particular at the passage headed "**You can ask us to reconsider a decision**". An individual who has missed the one month deadline (regulation 5(1)(b)(i)) and has not sought reasons (regulation 5(1)(b)(ii) or (iii)) would assume that there is no further possibility of challenge. Thus, the claimant submitted that the decision notices were not compliant with regulation 7(3)(a), and so were defective, as they failed to include the information contained in regulation 5(1)(b)(iv), which cross-referred to regulation 6. That being so, the claimant contended that the time for challenging the decisions had not started to run and so her revision application could be viewed as an any grounds application that was made in time.

67. The Secretary of State's response to this submission, again in summary, runs as follows. First, regulation 7 requires that "the time limit under regulation 5(1)" should be communicated. In that context "the time limit" means precisely that, the

time limit, and not the possibility of *extending* the time limit. The regulation 5(1) time limit is one month from the date of the notification of the original decision (in a case where reasons are not requested). Secondly, regulation 6 is headed "Late application for revision" and an application can only be viewed as being "late" by reference to the parameters specified in regulation 5(1)(b)(i)-(iii) inclusive. The extension contemplated by regulation 6 can only be understood by reference to those limits – it cannot coherently be read as encompassing regulation 5(1)(b)(iv). Thirdly, if the intention had been that the notification of the decision should also specify the circumstances in which the time limit could be extended pursuant to regulation 6, the legislation could have required as much, but the regulations did not so specify.

68. Having sketched out the parameters of the debate, I now turn to examine the more detailed submissions on the construction of regulations 5 to 7 inclusive.

69. The starting point for Mr Royston's submissions is his assertion that regulation 5(1)(b) identifies four separate and distinct time limits for making an application for a revision, each applicable to different factual circumstances. I am not persuaded that this premise is correct. Rather, regulation 5(1)(b) specifies a primary or default one-month time limit (regulation 5(1)(b)(i)), which is then subject to modification in prescribed situations where reasons have been requested (regulation 5(1)(b)(ii) and (iii), both of which are tied back into paragraph (i)), and which is also subject to a potential extension (regulation 5(1)(b)(iv)). The very notion of a time limit connotes a pre-determined and defined period of time, whether that be e.g. 28 days, one month or 12 or 13 months. However, the criteria set out in regulation 6 are such that the period in question may be of any length up to a further 12 months (see regulation 6(3)(c)). To take an entirely random example, it could be 277 days. Or 278 days – or 279 days and so on. Regulation 5(1)(b)(iv) is therefore better seen conceptually as an individualised discretionary extension to an existing default time limit rather than as a separate and freestanding time limit in its own right. Mr Royston makes several further submissions which I find to be less than compelling.

70. First, Mr Royston relies on section 6 of the Interpretation Act 1978, which provides that words in the singular include the plural and vice versa (unless the contrary intention is evident). The reference to the regulation 5(1) "time limit" in the singular in regulation 7(3)(a) should therefore be read, he says, as a reference to time limits in the plural. However, this submission does not address the conceptual distinction between a time limit and an extension to a time limit.

71. Secondly, it is argued that even if the reference to a time limit is in the singular, in the case of any given individual there can only be one applicable time limit, dependent upon their particular factual circumstances. Moreover, regulation 6 is part of the mechanism for determining whether the time limit is set by reference to regulation 5(1)(b)(iv). This too fails to pay sufficient regard to the distinction between a time limit and an extension to a time limit.

72. Thirdly, the submission is made that the Secretary of State's construction fails to inform claimants of their relevant procedural rights. There is necessarily a judgement call to be made as to the extent of the information provided in decision letters as to potential further courses of action. That judgement call has to balance the competing demands of clarity and comprehensiveness. The decision letters

now under challenge give clear and specific guidance about the basic time limit beyond which any extension would be discretionary in any event.

73. Fourthly, Mr Royston contends that if the legislator had wished to refer in regulation 7(3)(a) specifically and only to regulation 5(1)(b)(i), rather than to regulation 5(1) more generally, then they could have done so. The proper inference was that the global reference to regulation 5(1) was meant to cover all the heads in regulation 5(1)(b). I consider this argument is outweighed by the factors discussed in the following paragraph.

74. As a matter of statutory construction, the submissions of Mr Anderson are the more persuasive. He accepts that regulation 7 requires the communication of the time limit in regulation 5(1). In doing so, the Secretary of State correctly identifies the important conceptual distinction between a time limit and an extension to that time limit. Reading regulations 5, 6 and 7 together, as they must be, what is extended under regulation 6 is the time limit specified in regulation 5(1). Furthermore, the reference to regulation 5(1) in regulation 6(1) cannot include regulation 5(1)(b)(iv) as it would be otherwise entirely circular. In addition, there is no reason to think that the references to regulation 5(1) in both regulation 6(1) and regulation 7(3)(a) are used in a different sense; rather, one would expect the same term to carry the same meaning wherever it appears. The Secretary of State's submissions garner further support from the heading to regulation 6 – the expression "late application" in the heading must be understood as meaning late by reference to the time limit specified in regulation 5. The heading to the regulation provides part of the context for the process of interpretation (see *R v Montila* [2004] UKHL 50 at [34] and *KL v Secretary of State for Work and Pensions (JSA)* [2022] UKUT 270 (AAC) at [15]), albeit that headings may not always be reliable (*Ipswich Borough Council v TD and SSWP (HB)* [2024] UKUT 118 (AAC)). All in all, I am satisfied that, on a plain reading of the legislative language, regulation 7(3)(a) requires communication of the primary one month time limit in regulation 5(1) and not the possibility of a discretionary extension to that time limit under regulation 6.

75. The last shot in Mr Williams and Mr Royston's collective locker was to argue (somewhat belatedly) that the Secretary of State's construction of regulation 7(3)(a) was incompatible with the claimant's ECHR Article 6 rights.

76. Article 6 of the ECHR provides that "in the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". In outline, the claimant's submission runs as follows. Access to the FTT is regulated in part by regulation 7, which must therefore be compliant with Article 6. That, in turn, requires a practical and effective right of access to the tribunal (*Bellet v France*, Application No.23805/94 at §38). Moreover, the route to an independent tribunal, including the time limits for bringing a challenge at every stage, must be communicated in a way which is clear (*de Geouffre de la Pradelle v France*, Application No.12964/87 at §34).

77. In my judgement there are two principal difficulties with these submissions.

78. The first is that Article 6 is only engaged where there is a genuine and serious dispute relating to a civil right. Notably, the outcome of the proceedings in question must be directly decisive for the right in question (*Regner v Czech Republic* Application No.35289/11 at §99). Plainly, therefore, Article 6 applies to

the appeal before the FTT and the Upper Tribunal alike. Equally, however, it does not apply to the Secretary of State's decision-making processes, whether at the stage of the claim determination or during any revision thereof. Mr Royston submitted that this reading was inconsistent with the analysis of the Upper Tribunal in *R (CJ) and SG v Secretary of State for Work and Pensions* [2017] UKUT 324 (AAC); [2018] AACR 5 and that of the High Court in *R (Connor) v Secretary of State for Work and Pensions* [2020] EWHC 1999 (Admin). Neither objection withstands close scrutiny. As to the former, Mr Royston relied on the passage in the judgment of the Upper Tribunal at paragraphs 64-69, where the three judge panel reminded itself of the overlap between ECHR Article 6 and common law fairness as part of the backdrop to the process of statutory construction. However, that decision, whilst plainly authority for the proposition that clear language is needed to remove or interfere with existing rights of appeal, does not take Mr Royston's argument any further. As to the latter, Mr Royston noted that the requirement to undertake mandatory reconsideration without provision for interim payment of benefit had been adjudged to be a disproportionate interference with the right of access to the FTT in the context of ESA appeals. In the absence of any discussion as to how Article 6 applied to the process of mandatory reconsideration, this authority likewise takes the claimant's case no further forward.

79. The second difficulty with the attempt to invoke Article 6 is that in any event the claimant was not denied access to a relevant tribunal in any meaningful sense. The applicable test is that any restriction on such access "must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (*de Geouffre de la Pradelle v France*, Application No.12964/87 at §28). This is necessarily a fact-sensitive assessment – and the present circumstances are a long way removed from the almost Kafkaesque complexity of the factual situation in *de la Pradelle*, in which the Strasbourg Court noted "the extreme complexity of the positive law" involved (at §33). In that context Mr Royston laid great emphasis on what he described as the extremely short time limits under regulations 5 to 7 which, he argued, compared very unfavourably with those operating elsewhere in the civil justice system, not least given that those individuals most likely to be affected will typically be vulnerable and lacking representation. The answer to that specific submission lies in Judge Poole's decision in *PH and SM v Secretary of State for Work and Pensions (DLA)(JSA)* [2018] UKUT 404 (AAC); [2019] AACR 14 at paragraph 6. The Strasbourg Court in *de la Pradelle* ruled that "the applicant was entitled to expect a coherent system that would achieve a fair balance between the authorities' interests and his own; in particular, he should have had a clear, practical and effective opportunity to challenge an administrative act" (at §34). Taken in the round, that test was met here.

80. In summary, therefore, I reject the claimant's submission that the Secretary of State's communications of the decisions did not inform her of the matters prescribed in regulation 7(3)(a). That being so, I need not consider the further submissions that were made before me as to whether or not the claimant experienced any prejudice as a result of the notification issue.

Conclusion

81. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (TCEA 2007, section 12(2)(a)).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 2 January 2025