Neutral Citation Number: [2025] UKUT 332 (AAC)
Appeal Nos. UA-2024-000383-PIP and
UA-2024-000293-ESA

RULE 14 Order:

Save with the permission of this Tribunal, no one shall publish or reveal the name or address of the appellant TR or the town in which she lives, or any information that would be likely to lead to identification of the same.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

(1) TR
(2) GD

Appellants

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: The Hon. Mrs Justice Heather Williams DBE, Upper Tribunal Judge West and Upper Tribunal Judge Stout
Hearing date: 21 July 2025
Mode of hearing: Hybrid

Representation:
For TR: David Stead, Tyne and Wear Centre Against Unemployment
For GD: Tom Royston of counsel, instructed by Child Poverty Action Group
Respondent: Paul Skinner of counsel

On appeal from (in the case of TR):
Tribunal: First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC232/22/00219
Tribunal Venue: North Shields
Decision Date: 11 October 2023

On appeal from (in the case of GD):
Tribunal: First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC302/23/00131
Tribunal Venue: Ashford
Decision Date: 28 June 2023

SUMMARY OF DECISION

REVIEWS, REVISIONS AND SUPERSESSIONS (30)

This case concerns appeals brought following an application to the Secretary of State for revision of a previous decision of the Secretary of State under section 8 of the Social Security Act 1998 (SSA 1998) or previous supersession decision under section 10 of that Act. The three-judge panel of the Upper Tribunal reviews the case law and decides (disapproving in part *PH and SM v SSWP (DLA) (JSA)* [2018] UKUT 404 (AAC) and some other earlier cases) that:-

(1) Where an application for revision has been made more than 13 months after the original decision or supersession decision, whether the First-tier Tribunal has jurisdiction on appeal depends on the Secretary of State having considered an application that is in substance a request for revision that raises grounds which, if made out, would be capable of being in fact or law an official error (or other relevant "any time" ground for revision);

(2) If the Tribunal decides that, properly construed, the application was not such an application, the Tribunal must strike out the appeal under rule 8(2)(a) of the Tribunal Procedural Rules for lack of jurisdiction;

(3) If an application has been made but the Secretary of State has not yet considered it, the Tribunal may consider staying the appeal to enable the Secretary of State to do so;

(4) If the Secretary of State has considered such an application, the primary one-month time limit (with maximum 13-month extension) for appealing to the Tribunal under regulation 22 of the Tribunal Procedure Rules applies, and it begins to run from the date the claimant is sent notice of the revision decision;

(5) On such appeals, if the appeal is brought within that time limit (including any extension), then:

   a. if the application was for revision of an original decision under section 8, the First-tier Tribunal has jurisdiction on a "full merits" and *de novo* basis and must deal with the case as if it is standing in the shoes of the Secretary of State on the date that the Secretary of State made the original decision

under section 8, save that (by virtue of section 12(8)(a) of the SSA 1998) it need not consider any issue not raised by the appeal;

b. if the application was for revision of a supersession decision under section 10, the First-tier Tribunal's jurisdiction is similarly "full merits" and *de novo* but the Tribunal is standing in the shoes of the Secretary of State on the date that the Secretary of State made the supersession decision and so is limited, as the Secretary of State was when taking the decision, to considering whether one of the legislative grounds for supersession has been established and, if so, what the consequences of that should be applying the legislative scheme.

The same "full merits" approach applies whether the Secretary of State refuses the application to revise, or allows it only in part or (*obiter*) revises it adversely to the claimant.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.

DECISION

The decision of the Upper Tribunal is to allow the appeals. The decision of the First-tier Tribunal in both appeals involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, we set those decisions aside and remit the cases to be reconsidered by fresh tribunals in accordance with the following directions.

DIRECTIONS

1. **The appeals in both cases are remitted to the First-tier Tribunal for reconsideration at (separate) oral hearings in accordance with the law as set out in this decision.**

2. **The new First-tier Tribunals should not involve the tribunal judge, medical member or disability member previously involved, in TR's case, in considering this appeal on 11 October 2023 and, in GD's case, on 28 June 2023.**

3. **The new First-tier Tribunals can only consider the appeal by reference to the appellants' health and other circumstances as they were at the date of the original decisions by the Secretary of State under appeal (namely, in TR's case, on 26 May 2017 and, in GD's case, on 19 April 2018).**

4. **The new First-tier Tribunals are not bound in any way by the decision of the previous tribunals. Depending on the findings of fact they make, the new tribunals may reach the same or a different outcome to the previous tribunal.**

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

REASONS FOR DECISION

Introduction

1. These two cases were listed together to be heard by a three-judge panel of the Upper Tribunal because they raise questions of law of special difficulty or important principles of practice in relation to applications for revision of decisions in relation to benefit entitlements made more than 13 months after the original decision was notified to the claimant. In particular, they were listed to consider the following questions:

    a. Whether a right of appeal to the First-tier Tribunal arises in respect of an application for revision on grounds of official error only if the decision was actually made in consequence of an official error;
    b. If not, what condition must be satisfied to give rise to a right of appeal, in particular:
        i. Is it sufficient that the Secretary of State has considered an application that is, properly construed, an application on the ground of official error;
        ii. Or does the claimant have to raise in the application (or, potentially, on appeal) an arguable case of 'official error'; and,
    c. Whether, if the First-tier Tribunal has jurisdiction to hear such an appeal, it must determine the appeal in the same way as it would an 'ordinary' appeal against the original decision on its full merits, or whether it is limited to considering only the alleged 'official error' grounds.

2. The structure of our decision is as follows:-

The facts of TR's case and the First-tier Tribunal's decision

3. TR's case concerns her entitlement to Personal Independence Payment (PIP) under sections 78 and 79 of the Social Security Act 1998 ("SSA 1998") and the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) ("the PIP Regulations").

4. TR first made a claim to PIP in 2015. On that occasion she was awarded 2 points in relation to daily living activities. The decision was not revised on mandatory reconsideration and was upheld by the First-tier Tribunal on appeal.

5. TR made a second claim to PIP on 6 March 2017. On 26 May 2017 the Secretary of State decided not to make an award of PIP, allocating no points for either the daily living or mobility components. The appellant sought mandatory reconsideration of the PIP refusal, and on 11 July 2017 the Secretary of State decided not to revise the May 2017 decision. TR did not appeal that decision to the First-tier Tribunal at the time.

6. Two decisions of the Upper Tribunal, *MH v Secretary of State for Work and Pensions* [2017] AACR 12 and *RJ v Secretary of State for Work and Pensions* [2017] AACR 32, prompted the Secretary of State to undertake a Legal Entitlements and Administrative Practices ("LEAP") exercise. *MH* was decided on 28 November 2016 and concerned assessment of 'overwhelming psychological distress' when assessing mobility activity 2 (planning and following a journey). *RJ* was decided on 9 March 2017 and concerned the requirement that an activity be carried out 'safely' for the purposes of regulation 4(2A) of the PIP Regulations.

7. In response to an invitation from the Secretary of State as part of the *MH/RJ* LEAP exercise, the appellant's uncle on her behalf by letter of 30 January 2022 wrote: "I would be pleased if you would look again at my PIP award" and added: "Please bear in mind that I have a permanent cognitive impairment due to a sub arachnoid haemorrhage which occurred some years ago, this contributing to severe migraines and faints. Resulting from that incident and subsequent illness I have been on ESA benefit due to medical conditions for some time".

8. By decision letter of 5 August 2022, the Secretary of State informed TR that her case had been looked at again as part of the *MH/RJ* LEAP exercise, but the Secretary of State had decided her case was not affected by those decisions. The Secretary of State informed her that, if she disagreed with the decision, she could seek mandatory reconsideration.

9. By letter of 20 August 2022 the appellant (through her uncle) sought mandatory reconsideration referring to what she described as "the errors in your assumptions". Her letter pointed out that she had not previously appealed the May 2017 decision. It described her mental health condition and stated: "I am unable to carry out daily activities in a safe and timely manner and need supervision and prompting with assistance to plan ahead and need someone to plan [a] journey and provide supervision on that journey. My chronic migraines mean that I need someone to

supervise and administer my essential daily medication as I am unable to sort this out myself".

10. On 27 September 2022 the Secretary of State issued a mandatory reconsideration notice refusing to change the LEAP decision on the basis that the original decision was unaffected by the *MH/RJ* decisions. The letter informed the appellant of her right of appeal to the First-tier Tribunal, which she exercised.

11. The First-tier Tribunal hearing took place on 11 October 2023. TR attended with her representative, Mr Stead (who also represents her in this appeal). The Tribunal's decision notice was issued the same day and the Statement of Reasons was issued on 22 November 2023.

12. The Tribunal in its decision approached the case on the assumption that it had jurisdiction to hear the appeal. It considered the facts of TR's case and the facts of *MH* and *RJ* and decided that the appellant's entitlement to PIP was not affected by the decisions in *MH* and *RJ*. It therefore dismissed the appeal. It did not go on to consider the appeal on its 'full merits' as it would have done if the appeal were an 'ordinary' appeal against the 2017 decision.

The facts of GD's case and the First-tier Tribunal's decision

13. GD's case is concerned with his entitlement to Employment Support Allowance ("ESA") under section 2(5) of the Welfare Reform Act 2007 ("WRA 2007") and the Employment and Support Allowance Regulations 2008 ("ESA Regulations").

14. The underlying decision of the Secretary of State challenged in GD's case was a supersession decision made on 19 April 2018. The Secretary of State decided that GD had Limited Capability for Work ("LCW"), but he was not accepted as having Limited Capability for Work-Related Activity ("LCWRA") and so was not placed in the support group.

15. Although we do not have the decision letter in question, it is common ground that the Secretary of State's decision contained a statement to the effect that there was a right of appeal in relation to the decision only if the Secretary of State had first considered an application for its revision. However, GD did not make a request for mandatory reconsideration until 31 March 2022. In that letter he specifically requested an "any time revision" of the April 2018 decision on the basis of "official error". He explained that the "official error" was an error of law in that the decision maker had based the decision that he did not have LCWRA on the view of the Healthcare Practitioner that there would not be a substantial risk to the appellant's physical or mental health if he were to undertake "appropriate, tailored work related activity". GD argued that this meant that the decision-maker considered that work-related activity that was not appropriate or tailored would create a substantial risk and thus that he should have been treated as LCWRA.

16. On 5 January 2023 the Secretary of State informed GD that the April 2018 decision had been reconsidered but not revised on the basis that the Secretary of State did

not consider there had been an official error in it. The decision letter stated that it was a "Mandatory Reconsideration Notice" and informed the appellant of his right to appeal to the First-tier Tribunal, which he did on 7 February 2023.

17. The Secretary of State in response to the appeal did not object to the admission of the appeal on the ground that it was made more than one month after the 5 January 2023 mandatory reconsideration decision, but did submit that the application for mandatory reconsideration had been made out of time, that there was no official error in the April 2018 decision and that accordingly the Tribunal should dismiss the appeal. The Secretary of State relied on *IM v SSWP (ESA)* [2014] UKUT 412 (AAC), [2015] AACR 10, which the Secretary of State submitted had been properly applied by the decision-maker.

18. The Tribunal hearing took place by telephone on 28 June 2023. GD represented himself. The decision notice was issued on the same day and a Statement of Reasons was issued on 3 November 2023.

19. The Tribunal took as its starting point that, as a result of sections 9 and 12 of the SSA 1998, GD did not have a right of appeal against the Secretary of State's decision of 5 January 2023 refusing to revise the April 2018 decision.

20. The Tribunal then noted that the appellant was now "some years too late" to exercise a right of appeal against the April 2018 decision. It directed itself that it had only limited discretion to extend time beyond the period of 13 months from the original decision, and only if a refusal to extend time would give rise to a breach of Article 6 of the European Convention on Human Rights ("ECHR"). The Tribunal referred in this respect to a number of cases, including *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818. The Tribunal was not satisfied that the 13-month time limit could be extended by such a significant further period. It therefore refused to admit the appeal.

21. The Tribunal also added that, even if the appeal were valid, it would have accepted the submission of the Secretary of State that there was no official error in the decision. As with TR's case, the Tribunal did not go on to consider the appellant's appeal on its 'full merits'.

The grounds of appeal in both cases and the parties' positions

22. Judge Stout granted permission to appeal in TR's case on the basis that it was arguable that the Tribunal had erred in law. Judge Stout identified the following issues as arising for decision:

    a. Where an application has been made more than 13 months after the original decision for revision on the 'any time' ground of 'official error', whether the First-tier Tribunal's jurisdiction on appeal depends on:
        i. the Secretary of State having considered an application that is, properly construed, an application on the ground of official error;

ii. the appellant raising in the application an arguable case of 'official error';
iii. the appellant raising on appeal an arguable case of 'official error'; or
iv. the Tribunal being satisfied on the merits that there has been an 'official error';

b. Whether, if the First-tier Tribunal has jurisdiction on such an appeal (whether on basis i, ii, iii or iv above), it is bound to go on to determine the appeal against the original decision on its full merits (by reference to all relevant activities in Schedule 1 to the PIP Regulations in the normal way) or is limited only to considering the 'official error' grounds;

c. If the answer to a. is i, ii or iii, whether the First-tier Tribunal erred in this case in not concluding that it did have jurisdiction to hear the substantive appeal as, given that this was a LEAP exercise, and the appellant's request for reconsideration was a response to the Secretary of State having identified in principle grounds for 'official error', there could be no real doubt about the grounds on which the application had been made or their arguability;

d. If the answer to a. is iv., and the First-tier Tribunal was right to have sought to determine on the facts whether 'official error' was made out, whether it erred in law in the respects set out in the appellant's grounds of appeal;

e. If the answer to b. is 'yes', whether the First-tier Tribunal erred in law in this case by failing to consider the appellant's appeal on its full merits;

f. If, and to the extent that, the First-tier Tribunal in this case did seek to determine the appellant's appeal against the original decision on its full merits, whether it erred in law in the respects alleged by the appellant in the grounds of appeal.

23. Judge West granted permission to appeal in GD's case on the following grounds:-

a. Ground 1 is that the First-tier Tribunal was wrong to conclude that the appellant's appeal could only succeed if it was satisfied that the original decision arose from official error and that the First-tier Tribunal should have performed its statutory task of considering whether the appeal should be allowed on its merits;

b. Ground 2 is that the First-tier Tribunal was wrong to find in the appellant's case that the decision did not arise from official error;

c. Ground 3 is that time did not run against GD because the Secretary of State in the decision of 19 April 2018 failed to notify the appellant of the time limit for making an application for mandatory reconsideration under regulation 5(1) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and

Appeals) Regulations 2013 (SI 2013/381) ("the D&A Regulations") as required by regulation 7(3) of those Regulations.

24. In the light of the common issues in the two cases, which involve questions of law of special difficulty or important principles of practice, the cases were listed together before a three-judge panel to consider the issues of law that we have identified in paragraph 1 of our decision.

25. Although, as we describe below, there have been a number of conflicting decisions in the case law on these issues, by the time of the hearing, there was in fact a large measure of agreement between the parties as to the law. In particular, the parties were agreed that:

    a. a right of appeal to the First-tier Tribunal arises whenever the Secretary of State has considered an application to revise a decision on the ground of official error; and,

    b. where the First-tier Tribunal has jurisdiction to hear an appeal on that basis, the appeal is a full merits appeal against the original decision and is not restricted to considering whether there was an official error in the original decision.

26. As will be seen, although the law in this area is not straightforward, we have ultimately concluded that we agree with the parties on these issues. In view of the large measure of agreement between the parties, we do not in this decision set out their submissions in detail, but we reflect their submissions in our discussion and analysis below. We are grateful to all the representatives for their very helpful submissions, which illuminated a number of aspects of the law in relation to cases such as these.

Relevant legislative provisions

27. Chapter 2 of the SSA 1998 makes provision for benefits decisions to be made by the Secretary of State and for appeals to the First-tier Tribunal and thereafter the Upper Tribunal. Sections 8, 9 and 10 of the SSA 1998 provide, respectively, for the Secretary of State to make decisions, revision decisions and supersession decisions. They provide (so far as relevant) as follows:

> **8.— Decisions by Secretary of State.**
> (1) Subject to the provisions of this Chapter, it shall be for the Secretary of State—
> (a) to decide any claim for a relevant benefit;
> (b) …; and
> (c) subject to subsection (5) below, to make any decision that falls to be made under or by virtue of a relevant enactment;
> (d) ….

(2) Where at any time a claim for a relevant benefit is decided by the Secretary of State—
(a) the claim shall not be regarded as subsisting after that time; and
(b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.

(3) In this Chapter "relevant benefit", means any of the following, namely—
(a) benefit under Parts II to V of the Contributions and Benefits Act;
…
(ba) an employment and support allowance;…
(baa) personal independence payment;
…

9.— Revision of decisions.
(1) Any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State—
(a) either within the prescribed period or in prescribed cases or circumstances; and
(b) either on an application made for the purpose or on his own initiative; and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised.

(2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.

(3) Subject to subsections (4) and (5) and section 27 below, a revision under this section shall take effect as from the date on which the original decision took (or was to take) effect.
…
(5) Where a decision is revised under this section, for the purpose of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it is so revised.

(6) Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under this section before the appeal is determined.

10.— Decisions superseding earlier decisions.
(1) Subject to subsection (3) below, the following, namely—
(a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above;
...
(aa) any decision under this Chapter of an appeal tribunal or a Commissioner; and

> (b) any decision under this Chapter of the First-tier Tribunal or any decision of the Upper Tribunal which relates to any such decision may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
> …
> (5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.
> …
> (7) In this section—
> "appeal tribunal" means an appeal tribunal constituted under Chapter 1 of this Part (the functions of which have been transferred to the First-tier Tribunal);
> "Commissioner" means a person appointed as a Social Security Commissioner under Schedule 4 (the functions of whom have been transferred to the Upper Tribunal), and includes a tribunal of such persons.

28. As can be seen, a key difference between revision and supersession is identified by sections 9(3) and 10(5). Subject to exceptions for which provision is made in the regulations (and which do not concern us in this case), a revision decision under section 9 takes effect from the date of the original section 8 decision whereas a supersession decision under section 10 only takes effect from the date the supersession request was made or was decided.

29. Section 12 makes provision for a right of appeal to the First-tier Tribunal against decisions of the Secretary of State under section 8 and supersession decisions under section 10, but not (directly) against revision decisions under section 9. Rather, section 12 enables the making of regulations restricting the right of appeal in respect of decisions under sections 8 and 10 to circumstances where "the Secretary of State has considered whether to revise the decision under section 9". The relevant part of section 12 provides as follows:

> **12.— Appeal to First-tier Tribunal**
> (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, but nothing in this subsection shall confer a right of appeal—
(a) in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision, or
(b) where regulations under subsection (3A) so provide.

(3) Regulations under subsection (2) above shall not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required.

(3A) Regulations may provide that, in such cases or circumstances as may be prescribed, there is a right of appeal under subsection (2) in relation to a decision only if the Secretary of State has considered whether to revise the decision under section 9.

(3B) The regulations may in particular provide that that condition is met only where—
(a) the consideration by the Secretary of State was on an application,
(b) the Secretary of State considered issues of a specified description, or
(c) the consideration by the Secretary of State satisfied any other condition specified in the regulations.

(3C) The references in subsections (3A) and (3B) to regulations and to the Secretary of State are subject to any enactment under or by virtue of which the functions under this Chapter are transferred to or otherwise made exercisable by a person other than the Secretary of State.
…
(6) A person with a right of appeal under this section shall be given such notice of a decision to which this section applies and of that right as may be prescribed.

(7) Regulations may —
(a) make provision as to the manner in which, and the time within which, appeals are to be brought;
(b) provide that, where in accordance with regulations under subsection (3A) there is no right of appeal against a decision, any purported appeal may be treated as an application for revision under section 9.

(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.

(9) The reference in subsection (1) above to a decision under section 10 above is a reference to a decision superseding any such decision as is mentioned in paragraph (a) or (b) of subsection (1) of that section.

30. Sections 13 and 14 then provide, respectively, for reviews of the decision of the First-tier Tribunal by the First-tier Tribunal on receipt of an application for permission to appeal, and for appeals to the Upper Tribunal. Section 17 provides for the finality of decisions made in accordance with the foregoing provisions:

> **17 Finality of decisions**
> (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.
>
> (2) If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of—
> (a) further such decisions;
> (b) decisions made under the Child Support Act; and
> (c) decisions made under the Vaccine Damage Payments Act.

31. The final provision of the Act that we need to mention is section 27, which is often referred to as 'the anti-test case provision'. It provides in material part as follows:-

> **27 Restrictions on entitlement to benefit in certain cases of error**
> (1) Subject to subsection (2) below, this section applies where—
> (a) the effect of the determination, whenever made, of an appeal to the Upper Tribunal or the court ("the relevant determination") is that the adjudicating authority's decision out of which the appeal arose was erroneous in point of law; and
> (b) after the date of the relevant determination a decision falls to be made by the Secretary of State in accordance with that determination (or would, apart from this section, fall to be so made)—
> (i) in relation to a claim for benefit;
> (ii) as to whether to revise, under section 9 above, a decision as to a person's entitlement to benefit; or
> (iii) on an application made under section 10 above for a decision as to a person's entitlement to benefit to be superseded.
>
> …
> (3) In so far as the decision relates to a person's entitlement to a benefit in respect of—
> (a) a period before the date of the relevant determination; or
> (b) in the case of a widow's payment, a death occurring before that date,

> it shall be made as if the adjudicating authority's decision had been found by the Upper Tribunal or court not to have been erroneous in point of law.
>
> …
> (6) It is immaterial for the purposes of subsection (1) above—
> (a) where such a decision as is mentioned in paragraph (b)(i) falls to be made, whether the claim was made before or after the date of the relevant determination;
> (b) where such a decision as is mentioned in paragraph (b)(ii) or (iii) falls to be made on an application under section 9 or (as the case may be) 10 above, whether the application was made before or after that date.
>
> (7) In this section—
> "adjudicating authority" means—
> (a) the Secretary of State;
> …

32. The effect of section 27, as explained by Underhill LJ in *Secretary of State for Work and Pensions v Reilly* [2016] EWCA Civ 413, [2017] QB 657 is: "In bare outline, and at the risk of some oversimplification, … that, where the Upper Tribunal or a court considering an appeal relating to a claim under social security legislation holds that a provision of such legislation has a different effect from that on the basis of which the DWP had proceeded previously, the law as thereby established will for most purposes take effect only from the date of that decision: in other words, the usual rule that the decision of the court establishes what the law has always been does not apply."

33. The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381) ("the D&A Regulations") are made under various provisions of the SSA 1998.

34. Part 2 of the D&A Regulations deals with revision. Chapter 1 deals with "Revision on any grounds". Regulation 5 provides:

> **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).

(2) Paragraph (1) does not apply—
(a) in respect of a relevant change of circumstances which occurred since the decision had effect or, in the case of an advance award under regulation 32, 33 or 34 of the Claims and Payments Regulations 2013, since the decision was made;
(b) where the Secretary of State has evidence or information which indicates that a relevant change of circumstances will occur;
(c) in respect of a decision which relates to an employment and support allowance or personal independence payment where the claimant is terminally ill, unless the application for a revision contains an express statement that the claimant is terminally ill.

35. Regulation 6 makes provision in respect of applications for "any grounds" revisions made outside the one-month time limit set in regulation 5(1):

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.

36. Regulation 7 also falls within Chapter 1 of the Regulations. It makes provision, as permitted by section 12(3A) of the SSA 1998, restricting a person's right of appeal under section 12(2) of that Act against the Secretary of State's decision on certain benefits claims, so that it only arises once the Secretary of State has considered on an application whether or not to revise the original decision. Regulation 7 is thus the legislative basis of what is better known as "mandatory reconsideration" (a term not used in the SSA 1998 or the D&A Regulations, which use only the term "revision"). Regulation 7 provides as follows:-

7.— Consideration of revision before appeal
(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.

37. Chapter 2 of Part 2 to the D&A Regulations makes provision for "Revision on specific grounds". Unlike the "any grounds" revisions dealt with in Chapter 1 of Part 2, "specific grounds" revisions are not subject to any time limit. Regulation 8 provides:

> **8.** A decision of the Secretary of State under section 8 or 10 of the 1998 Act may be revised at any time by the Secretary of State in any of the cases and circumstances set out in this Chapter.

38. Revisions under Chapter 2 are thus commonly referred to as revisions on "any time" grounds and we will adopt that terminology in this decision. The ground that is of particular relevance in this case is revision for "official error, mistake etc", which is provided for in regulation 9 as follows:-

> **Official error, mistake etc.**
> **9.** A decision may be revised where the decision—
> (a) arose from official error; or
> (b) was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant than it would otherwise have been.

39. "Official error" is defined in regulation 2 as follows:-

> "official error" means an error made by –
> (a) an officer of the Department of Work and Pensions or HMRC acting as such which was not caused or materially contributed to by any person outside the Department or HMRC;
> (b) a person employed by, and acting on behalf of, a designated authority which was not caused or materially contributed to by any person outside that authority,
> but excludes any error of law which is shown to have been such by a subsequent decision of the Upper Tribunal, or of the [High Court, Court of Appeal or Supreme Court].

40. This is not the place for an exposition of the law on what constitutes "official error", but we remind ourselves that Mr 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 [13]).

41. We further note that, as Deputy Judge Ovey explained so clearly in *DB v SSWP* [2023] UKUT 95 (AAC) at [37]-[39] (a decision to which we return below for other reasons), the definition of official error needs to be read together with section 27 of the SSA 1998, so that the effect of the definition of official error is that a decision cannot be shown to be in official error just because a subsequent decision of the Upper Tribunal or courts establishes a different legal approach or test. In the two appeals before us, we are not concerned with this point, however, because GD's case does not rely on any such change in legislation or case law, and the original

decision in TR's case was taken before the decisions in *MH* and *RJ* on which the LEAP exercise was based.

42. Regulation 20 purports to set out the procedure for making an application for a revision, but in fact includes nothing that is prescriptive, just certain powers enabling the Secretary of State to do various things, including (sub-section (1)) treating an application for supersession as an application for revision, or (sub-section (3)) obtaining further evidence from the applicant.

43. Regulation 21 provides that:

> **21. Effective date of a revision**
> Where, on a revision under section 9 of the 1998 Act, the Secretary of State decides that the date from which the decision under section 8 or 10 of that Act ("the original decision") took effect was wrong, the revision takes effect from the date from which the original decision would have taken effect had the error not been made.

44. Part 3 of the D&A Regulations makes provision in relation to supersession decisions as permitted by section 10 of the SSA 1998. We are not in this case concerned with any of the detailed provision in relation to supersession decisions. We remind ourselves that, by regulations 20(1) and 33(1), an application for revision may be treated by the Secretary of State as an application for supersession and vice versa.

45. Part 7 of the D&A Regulations makes additional provision in relation to appeals. Regulation 51 sets out the obligation on the Secretary of State to give written notice of decision and the right to appeal:-

> **Notice of a decision against which an appeal lies**
> **51.**—(1) This regulation applies in the case of a person ("P") who has a right of appeal under the 1998 Act or these Regulations.
>
> (2) The Secretary of State must—
> (a) give P written notice of the decision and of the right to appeal against that decision…

46. Regulation 52 makes provision in relation to appeals against decisions which have been revised. Section 9(6) of the SSA 1998 (set out above) provides that a claimant's right to appeal lapses where a decision is revised, save in prescribed circumstances. Regulation 52(1)(b) prescribes that the right to appeal "does not lapse where the decision of the Secretary of State as revised is not more advantageous to the appellant than the decision before it was revised". Regulation 52(2) provides that, in such cases, "the appeal must be treated as though it had been brought against the decision as revised".

47. The time limits for bringing appeals are not dealt with in the D&A Regulations, but in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) ("the Tribunal Procedure Rules"). Regulation 22 provides:-

22.— Cases in which the notice of appeal is to be sent to the Tribunal

(1) This rule applies to all cases except those to which—
(a) rule 23 (cases in which the notice of appeal is to be sent to the decision maker), or
(b) rule 26 (social security and child support cases started by reference or information in writing),
applies.

(2) An appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received—
…
(d) in other cases—
(i) if mandatory reconsideration applies, within 1 month after the date on which the appellant was sent notice of the result of mandatory reconsideration;
(ii) if mandatory reconsideration does not apply, within the time specified in Schedule 1 to these Rules (time limits for providing notices of appeal in social security and child support cases where mandatory reconsideration does not apply).

…

(6) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—
(a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and
(b) subject to paragraph (8) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal.

…
(8) Where an appeal in a social security and child support case is not made within the time specified in paragraph (2)—
(a) it will be treated as having been made in time, unless the Tribunal directs otherwise, if it is made within 12 months of the time specified and neither the decision maker nor any other respondent objects;
(b) the time for bringing the appeal may not be extended under rule 5(3)(a) by more than 12 months.

(9) For the purposes of this rule, mandatory reconsideration applies where—
(a) the notice of the decision being challenged includes a statement to the effect that there is a right of appeal in relation to the decision only if the decision-maker has considered an application for the revision, reversal, review or reconsideration (as the case may be) of the decision being challenged; or

(b) the appeal, other than an appeal under section 38(1) of the Tax Credits Act 2002, is brought against a decision made by His Majesty's Revenue and Customs.

The legal framework

48. We have found it helpful in this appeal first to address what we would consider the effect of the legislation to be if we did not have the benefit of previous authorities on this issue. In doing so, we apply the well-established principles of statutory interpretation as recently re-stated by Lord Hodge in *R (O) v Home Secretary (SC(E))* [2022] UKSC 3, [2023] AC 255 at [28]-[31], i.e. by objectively assessing the meaning which a reasonable legislature would be seeking to convey by the words used in their relevant legislative context.

49. We set out our conclusions in this regard in this section of our judgment, referring at this first stage only to those principles established by authorities that are not in any doubt in this appeal. In the next section, we set out the previous case law and, where our view of the legislation differs to that reached in previous cases, we explain why we consider our reading of the legislation is correct. We then deal separately with the specific question of what is required of an application for revision to trigger a right of appeal under the legislative framework as we consider it to be. We summarise our conclusions at the end.

50. As can be seen from the legislative provisions set out above, a claimant only has a right of appeal under section 12 of the SSA 1998 in respect of the Secretary of State's "original" benefits decision made under section 8 of that Act, or against a supersession decision made under section 12 of the Act. Section 12 confers no right of appeal directly against a revision decision made under section 9 of the Act. Rather, by section 12(1), the right of appeal lies against the original or supersession decision, but "as revised" (or not revised) under section 9: see the Tribunal of Commissioners' decisions in *R (IB) 2/04* at [38] and *R (IS) 15/04* (the latter holding that the only way of challenging directly a decision not to revise for official error being judicial review).

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51. However, by section 12(3A) of the SSA 1998 and regulation 7(2) of the D&A Regulations, if the benefits decision 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 revision, then the right of appeal cannot be exercised unless "the Secretary of State has considered on an application whether to revise the decision under section 9 of [the SSA 1998]". That, as already noted, is the "mandatory reconsideration" requirement. This, therefore, is the first jurisdictional requirement that must be fulfilled before the First-tier Tribunal will have jurisdiction to hear an appeal. In a 'standard' case, the request for revision will be a request for a revision on "any grounds" under regulation 5 of the D&A Regulations. As such, the application must be made within one month of the date of notification of the original decision, or the Secretary of State may extend that time limit under regulation 6, but

only if the application is made within 12 months of the latest date when it should have been received: see regulation 6(3)(c). As such, the maximum extension in 'standard' cases is 13 months after the original decision.

52. The second jurisdictional requirement in respect of an appeal to the First-tier Tribunal that is of relevance to the present cases is that as to time limits. Those are set by regulation 22 of the Tribunal Procedure Rules. Time limits in cases to which mandatory reconsideration apply run from the date of the mandatory reconsideration decision. The normal time limit under regulation 22(2)(d) is one month, but that may be extended under rule 5(3)(a) (the general power to extend time) and unless it is extended the Tribunal must not admit the notice of appeal (regulation 22(6)(b)).

53. By regulation 22(8)(a), where an appeal is not made within the primary one-month time limit, it will be treated as having been made in time, unless the Tribunal directs otherwise, if it is made within 12 months of the primary one-month time limit, provided that neither the Secretary of State or any other respondent object. However, by regulation 22(8)(b), the time for bringing the appeal may not be extended under rule 5(3)(a) by more than 12 months. Accordingly, so far as the face of the legislation is concerned, the maximum time within which an appeal may be brought is 13 months from the date of the mandatory reconsideration decision. Nonetheless, it may be that time can be further extended *"in exceptional circumstances"* where the appellant *"personally has done all he can to bring [the appeal] timeously"* on the basis of what is often referred to as "the *Adesina* principle": see *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818 at [15] *per* Maurice Kay LJ, followed by Fordham J in *Rakoczy v General Medical Council* [2022] EWHC 890 (Admin). (Although we note that in one of the decisions the parties have relied on in these proceedings, *GJ v Secretary of State for Work and Pensions* [2022] UKUT 340 (AAC), Judge Wikeley at [61] and [71] expressed some doubt as to whether the *Adesina* principle could ever properly apply in this context. This is not, however, a legal issue that concerns us in this case.)

54. In the case of what we call a 'standard' benefits decision under section 8, and on the face of the legislation, the latest that an appeal to the Tribunal may be commenced would be 26 months after the original benefits decision (i.e. maximum 13 months from the date of decision to apply for mandatory reconsideration and maximum 13 months from the date of mandatory reconsideration to appeal to the Tribunal). In such cases, and although the legislation does not include any express powers setting out the jurisdiction of the First-tier Tribunal on appeal, it is well established that the First-tier Tribunal 'stands in the shoes' of, and has the same powers as, the Secretary of State (see *R (IB)* 2/04 at [12]-[25]) and decides the claimant's case afresh by reference to the circumstances as they were at the time when the decision appealed against was made (see section 12(8)(b) of the SSA 1998). It is worth setting out what the Tribunal of Commissioners said in *R (IB) 2/04* about the nature of the Tribunal's jurisdiction. (We return to the other aspects of this case further below.):

> 13. The following features of an appeal to an appeal tribunal are in our judgment clear.

14. First, the appeal is general, i.e. it is an appeal on fact and law. This was common ground between the parties to the appeals before us, and has been universally accepted since the introduction of the statutory scheme. Indeed, the appeal tribunal is designed to be a superior fact finding body, and is able to investigate the facts in greater depth than usually occurs before the decision-maker. The composition of appeal tribunals (with one or two members in addition to the legally qualified chairman, where considered appropriate by the legislature) is designed to enable them most effectively to make the necessary findings of fact. Unlike the decision-maker, appeal tribunals hear oral evidence where necessary. In the light of the fact that the initial decision is made by the Secretary of State (i.e. a person patently lacking in independence) and of the limited scope for the claimant to make representations to the Secretary of State, nothing less than such a superior fact finding body would be sufficient to comply with Article 6 of the European Convention on Human Rights ("the Convention"). We return to this point below.

15. Second, and as a consequence of the first feature to which we have referred, the appeal tribunal's jurisdiction is not limited to affirming or alternatively setting aside the decision under appeal. If, having made its own findings of fact, it considers the decision to be wrong, it has power to make the decision on the claim which it considers the Secretary of State ought to have made on the basis of the facts which it has found. In cases where the appeal tribunal makes a different decision from that made by the Secretary of State, the appeal tribunal's decision simply replaces that of the Secretary of State - and it is at least arguable that this is also the case where the appeal tribunal confirms the Secretary of State's decision and dismisses the appeal (see, for example, the decision of the Tribunal of Commissioners in *R(I) 9/63*).

16. The fact that even the most basic powers of an appeal tribunal have to be inferred from the nature of the appeal has two important consequences.

17. First, contrary to Miss Lieven's submission for the Secretary of State, in determining the powers of an appeal tribunal, it is in our judgment proper to consider the nature and operation of the system of adjudication and appeal in force before the 1998 legislation, as relevant to what can properly be regarded as inherent in or implied by the provision of a right of appeal in the 1998 Act.

18. Second, we find generally unpersuasive the emphasis placed by both Mr Drabble and Miss Lieven (albeit to different ends) on the fact that the 1998 legislation expressly gives particular powers only to the Secretary of State and not to appeal tribunals. We acknowledge that this has also been regarded as important by some Commissioners in a number of individual decisions. However, as indicated above, no powers of decision whatsoever are expressly given to appeal tribunals. It is accepted by both Counsel - and,

> indeed, it is universally accepted - that appeal tribunals have some powers of decision, such as to substitute the proper decision on a claim in allowing an appeal against an initial decision on the claim. Since these powers must be found by a process of implication, in our view the absence of express statutory powers for an appeal tribunal in any particular instance can have little, if any, significance.
>
> *Appeal by way of rehearing*
> 19. There is considerable authority that, prior to the 1998 legislation, an appeal was by way of complete rehearing, and as to what such a rehearing entailed in the context of benefits. …
>
> 25. In our judgment, that approach to the nature of an appeal as a rehearing, which is how it was understood in the social security context before the 1998 Act changes, is to be applied to the current adjudication and appeal structure, subject only to express legislative limitations on its extent. Taking the simple case of an appeal against a decision on an initial claim, in our view the appeal tribunal has power to consider any issue and make any decision on the claim which the decision-maker could have considered and made. The appeal tribunal in effect stands in the shoes of the decision-maker for the purpose of making a decision on the claim. As to the nature of an appeal to a tribunal, we therefore agree with the position stated by Mr Commissioner Jacobs in paragraphs 11 and 12 of *CH/1229/2002*.
>
> 26. … in *CDLA/5196/2001*, Mr Commissioner Rowland recorded the Secretary of State as submitting that "notwithstanding the fact that the Secretary of State had not given the correct decision or decisions, the tribunal were entitled to give whatever decisions should have been given by the Secretary of State" (paragraph 14). We consider that the approach advocated by the Secretary of State in those cases is correct.

55. The position is different for supersession decisions, in respect of which it is well established, and not in doubt on this appeal, that on an appeal against a supersession decision (as revised or not) the Tribunal must approach the appeal as if it is 'standing in the shoes' of the Secretary of State making that supersession decision, and must decide first whether a ground for supersession is established before considering the case on its "full merits": see *Wood v SSWP* [2003] EWCA Civ 53, a case to which we return below.

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56. In the present case, however, we are not concerned with 'standard' decisions or appeals therefrom. We are concerned with requests for revision made by claimants outside those maximum 'standard' time limits. We are concerned with requests for revision on "any time" grounds, in particular on grounds of "official error" under regulation 9 of the D&A Regulations. Such requests may, self-evidently, be made at any time after the original decision, including many years after, as is the situation in the present appeals. If the Secretary of State on considering such a request agrees

that there is an official error, the original decision will be revised accordingly with retrospective effect to the date of the original decision (in accordance with regulation 21 of the D&A Regulations). If the Secretary of State does not agree there is an official error, the request for revision will be refused. That decision, being a decision on a revision, does not attract a right of appeal under section 12 of the SSA 1998; the right of appeal remains in principle a right of appeal against the original decision.

57. As happened in GD's case, this decision on the application for an "any time" grounds revision can itself count as a "mandatory reconsideration" for the purposes of regulation 22 of the Tribunal Procedure Rules. As already noted, "mandatory reconsideration" is not a term used in the social security legislation itself, but it is effectively defined for the purposes of regulation 22 of the Tribunal Procedure Rules by regulation 22(9), which states that "mandatory reconsideration applies where the notice of the decision being challenged includes a statement to the effect that there is a right of appeal in relation to the decision only if the decision-maker has considered an application for the revision, reversal, review or reconsideration (as the case may be) of the decision being challenged". "Mandatory reconsideration" is thus defined as applying where the Secretary of State has, as permitted by section 12(3A) of the SSA 1998 and regulation 7(2) of the D&A Regulations, restricted the right of appeal against an original decision so that it only becomes available where the decision-maker has "considered *on an application* whether to revise the decision".

58. None of the legislative provisions expressly limits the type of application for revision, or consideration of revision, only to applications for revision on "any grounds" under regulation 5, so that in principle, on the face of the legislation, an "any time" application for revision can equally count as a "mandatory reconsideration" for the purposes of the time limits for applying to the First-tier Tribunal. The appeal must then be filed with the Tribunal within one month of that decision or, at the latest, within 13 months as permitted by regulation 22(8). In fact, in these proceedings, TR filed in time on that basis and GD filed his appeal slightly over one month after the decision of the Secretary of State of 5 January 2023 refusing to revise the original 19 April 2018 decision.

59. In TR's case, however, the sequence was slightly different, as the Secretary of State's decision of 5 August 2022 refusing to revise the original 26 May 2017 decision itself contained a statement informing TR that if she disagreed with the decision she could seek mandatory reconsideration. Although the letter did not say so in terms, it used the standard mandatory reconsideration notice, so that on its face it appears in legal terms to be an invitation to make a 'standard' "any grounds" application for revision under regulation 5 within one month of the decision of 5 August 2022. However, formally, so far as the legislation is concerned, a revision under section 9 of the SSA 1998 can only be a revision of an original decision under section 8 or a supersession decision under section 10. As such, this cannot have been an invitation to make an "any grounds" application for revision under regulation 5 because it was outside the maximum 13 months from the original decision date permitted by that regulation. So far as the legislation is concerned, therefore, it could only have been an invitation to make a further "any time" application for revision. In practice, that was how TR and the Secretary of State dealt with it and the appellant

then appealed to the Tribunal within one month of receiving the mandatory reconsideration notice on 27 September 2022.

60. As the right of appeal in both TR's and GD's cases remained a right of appeal against the original 2017 and 2018 decisions in each of their cases, as a matter of principle and applying the legislation without reference to previous case law, the First-tier Tribunal once seised of the appeal would simply proceed to consider the appeal on its full merits in the same way as a 'standard' appeal brought after a 'standard' "any grounds" mandatory reconsideration decision under regulation 5. On the face of the legislation, it seems to us (and the parties agree) that it cannot be right that the Tribunal's jurisdiction on such an appeal is limited to considering whether the Secretary of State was right to conclude there was no "official error", or that it is only if "official error" is established that the original decision can be reconsidered on its full merits. That is because the function in the legislative scheme of the Secretary of State's decision on the application to revise for official error is simply to re-trigger the right of appeal against the original decision. There is no right of appeal against the decision not to revise; the appeal lies only against the original decision, and it is well established that on such an appeal the Tribunal stands in the shoes of the decision-maker at the time of the original decision and exercises the original decision-making power *de novo*.

61. We observe that the effect of the legislation on its face is thus that a claimant may over time gain multiple opportunities to appeal the same decision, because (in cases where the original decision (or supersession decision) contained a statement that mandatory reconsideration applies) a fresh right of appeal will be triggered every time the Secretary of State "has considered on an application whether to revise the decision under section 9 of [the SSA 1998]". On the face of the legislation, that includes an application to revise on any basis, whether on "any grounds" under regulation 5, or on "any time" grounds under Chapter 2 of Part 2 to the D&A Regulations.

62. At first blush, that conclusion might seem odd, and raised the spectre in our minds prior to the hearing in this matter of 'abuse of process' as a result of a claimant potentially being able to bring multiple appeals in relation to the same decision. However, having raised that point with the parties at the hearing, we agree with them that this is not in fact the consequence of our conclusion. That is because a decision on an application to revise only gives rise to a *right* to appeal. A claimant may or may not choose to exercise that right. If they do not choose to exercise that right (as TR chose not to when her first right of appeal arose in 2017), they may trigger a further right of appeal by making a further application for revision. However, if they do choose to exercise their right of appeal, and the First-tier Tribunal makes a decision on that appeal, then the Tribunal's decision replaces the Secretary of State's decision and is "final" by virtue of section 17 of the SSA 1998. It cannot thereafter be revised by the Secretary of State under any circumstances because section 9 of the SSA 1998 does not give the Secretary of State power to revise any decisions other than his own. The Tribunal's decision may be superseded by the Secretary of State in the limited circumstances permitted by regulation 31 of the D&A Regulations, but in that case, the supersession decision would itself attract a fresh right of appeal

under the legislation; it would not re-open the door to a further appeal against the original decision. Accordingly, while a claimant may over time acquire multiple rights to appeal the same decision, they may only exercise that right once.

63. We also recognise that our approach leaves the Tribunal in the position, on an appeal triggered by a refusal to revise after the 13-month point on grounds of official error (or other "any time" ground), of enjoying greater powers on appeal than the Secretary of State had at the time of taking the decision whether or not to revise (when the Secretary of State could only revise or not on one of the "any time" grounds). However, that, it seems to us, is the logical consequence of Parliament not having provided for an appeal against the revision decision and only having provided for an appeal against the original decision or supersession decision. It is also the logical consequence of the parties' agreed position in this case as to the full merits nature of the Tribunal's jurisdiction on an appeal following a refusal to revise for official error.

64. Our reasoning is supported by the legislative history. Before the introduction of mandatory reconsideration, there was a right of appeal to the Tribunal directly against the original decision or supersession decision and it was well established that the jurisdiction of the Tribunal on that appeal was to take that decision again *de novo;* the Tribunal's jurisdiction was not to consider whether the decision could or should be revised on any of the grounds on which the legislation permitted the Secretary of State to revise the decision. There is equally no doubt that the introduction of mandatory reconsideration through "any grounds" revisions did not change (or, at least, was not intended to change) the nature of the Tribunal's jurisdiction on appeal, which remained an appeal against the original decision or supersession decision. The legislative changes made to introduce mandatory reconsideration were only addressed to introducing that process as a necessary step before appealing; no changes were made to the underlying appeal rights. As we have set out above, the function of a decision whether or not to revise on "any time" grounds in the legislative scheme is the same as a decision whether or not to revise on "any grounds": both simply trigger a right of appeal against the original decision. As such, the Tribunal's jurisdiction on such an appeal is in our judgment the same regardless of when it is brought. There is nothing in the legislation to suggest otherwise.

<u>The consequences of our interpretation</u>

65. We do recognise that our approach significantly weakens the strength of the time limits both for seeking revision and for bringing appeals as it means that a claimant can in principle generate a right of appeal against an original decision or supersession decision a long time after that decision was taken and well outside the time limits provided in the legislation. However, that is a consequence that the Secretary of State recognises and accepts, and we do not consider that consequence provides grounds for straining to give the legislation anything other than the interpretation that appears to us to be correct applying ordinary principles of statutory interpretation.

66. We observe that the effect of our approach is in fact merely to create greater parity between appeal rights where the Secretary of State refuses to revise his decision following an application and appeal rights where he does revise his decision (whether following an application or on his own initiative). By section 9(5) of the SSA 1998, if the Secretary of State revises a decision, then "for the purpose of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it is so revised". A claimant thus gains a fresh right to appeal to the Tribunal either directly in response to that revision decision or, if the Secretary of State so stipulates in that decision, following mandatory reconsideration of the same. It could be said that, if the legislature had wished to achieve the result that we consider it has, it could simply have amended section 9(5) to provide that a refusal to revise and a revision were to be treated in the same way for the purpose of appeal rights. We do not, however, consider that the fact that a similar result could have been achieved by a simpler method means that our reading of the legislation is wrong. There is no general principle of statutory interpretation to that effect. There is a presumption against redundancy, but our interpretation does not render section 9(5) redundant; section 9(5) deals with revisions, whilst the provisions we are concerned with deal with refusals to revise.

67. Further, the consequences of our decision may not be that significant in practice for the following reasons:

    a. The time limits (and provision for extensions of time) in the legislative scheme are relatively generous in any event. In our experience, it is only a very small proportion of appeals that are not brought within those limits.

    b. A late appeal that is focused on a particular issue, such as a failure to take into account a particular legal authority or item of evidence is relatively easily dealt with even after a passage of time.

    c. Section 12(8)(a) of the SSA 1998 will provide a means by which the scope of a late appeal may be limited. The Tribunal is not required to consider any issue not raised by the appeal so if the appeal focuses (as most will) on one of the specific grounds for "any time" revision, its scope will be limited. Perhaps more so than in 'standard' appeals, Tribunals may be reluctant to allow a late appeal to open consideration of aspects of a decision other than those directly raised by an appeal. However, we do not intend by making that observation to lay down any general rule: the decision as to whether to expand the scope of the appeal will be one for the Tribunal to take in accordance with the overriding objective in each case.

    d. Although some claimants may seek to bring what is effectively a 'standard' full merits appeal late, unfocused appeals challenging the decision on its full merits long after the original decision are likely to run into significant evidential difficulties because, by section 12(8)(b) of the SSA 1998, the decision must still be made by reference to the circumstances as they were at the time of the original decision (or supersession decision, as appropriate). The more time that has passed, the more difficult it will be in

most cases for a claimant to demonstrate that the circumstances at the time of the decision were anything other than they appeared to the Secretary of State to be. In appropriate cases, the First-tier Tribunal may use the power under rule 8 to strike out for no reasonable prospects of success if an appeal is hopeless.

68. We do note, however, that our approach has implications for the effect of section 27 of the SSA 1998 which may be counter-intuitive. Section 27 prevents the Secretary of State from revising or superseding a decision on the basis of a judgment of the Upper Tribunal or higher courts that post-dated the Secretary of State's original decision. As GD's case is an appeal against a supersession decision, section 27 will accordingly 'bite' on his appeal so as to limit the grounds on which his appeal may succeed. If we are right in our approach on this appeal, however, section 27 will not 'bite' on TR's case as it is a late appeal against a section 8 decision. The Tribunal is on her appeal exercising a *de novo* jurisdiction so it seems to us that it will need to decide her appeal by reference to the law as it stood at the date of the original decision, i.e. by reference to the legislation as it stood at that date, but taking into account any changes in understanding as to how the law works as a result of a subsequent judicial decision. We have not, however, in this appeal examined with the parties in any detail the effect of section 27 and any issue as to the application of section 27 in appeals such as these will need to be considered in a subsequent case. The potential consequences of section 27 not 'biting' in such cases may be mitigated to some extent by the fact that the definition of "official error" in regulation 2 excludes "any error of law which is shown to have been such by a subsequent [appellate] decision". As we set out further below, an application for revision that raises that as its only ground will not in our judgment constitute a valid "any time" application for revision and so will not trigger a new right of appeal. However, we recognise that the implications of our decision that an appeal to the Tribunal in "any time" revision cases is a full merits appeal means that, provided a claimant can surmount the initial jurisdictional hurdle of making a valid "any time" application for revision, their case on appeal will (on the basis of the law as we have concluded it to be in this case) need to be dealt with by reference to case law as it stands as at the date that the Tribunal is considering the appeal.

Previous case law

69. We begin with the decision of the Court of Appeal in *Wood v SSWP* [2003] EWCA Civ 53 and two decisions of the same Tribunal of Commissioners (Commissioners Hickinbottom, Mesher and Turnbull) decided two months apart in, respectively, January and March 2004: *R (IB) 2/04* and *R (IS) 15/04*. Both Tribunal of Commissioners decisions referred to and relied on *Wood*. All three cases were decided by reference to the provisions of the SSA 1998 as they stood before the amendments made by the Welfare Reform Act 2012 ("the WRA 2012") and by reference to the previous version of the D&A Regulations, the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) ("the 1999 D&A Regulations").

The earlier legislation

70. Much of the previous version of the legislation was materially identical to the current version, but the significant difference for our purposes is that it was not until the WRA 2012 that the legislation introduced the possibility of the Secretary of State imposing a requirement of mandatory reconsideration as a condition precedent to appealing to the Tribunal and as the basis for defining the limitation period for appealing. Otherwise, section 12(1) setting out the right of appeal against decisions under sections 8 and 10 (but not section 9) was materially identical. What the legislation at that time provided in relation to time limits was in material part as follows.

71. First, regulation 31 of the 1999 D&A Regulations provided a primary one-month time limit for appealing from the original decision under section 8, or from notification of a revision or supersession decision, including refusals to revise on what are now "any grounds" under regulation 5 of the current regulations. There was no provision for extending time for appeal against what are now "any time" revisions. Regulations 31 and 32 provided:

> **Time within which an appeal is to be brought**
> 31.— (1) Where an appeal lies from a decision of the Secretary of State to an appeal tribunal … the time within which that appeal must be brought is, subject to the following provisions of this Part—
> (a) within one month of the date of notification of the decision against which the appeal is brought; or
> (b) where a written statement of reasons for that decision is requested, within 14 days of the expiry of the period specified in sub-paragraph (a).
>
> (2) Where the Secretary of State —
> (a) revises, or following an application for a revision under regulation 3(1) or (3) does not revise, a decision under … section 9, or
> (b) supersedes a decision under … section 10,
> the period of one month specified in paragraph (1) shall begin to run from the date of notification of the revision or supersession of the decision, or following an application for a revision under regulation 3(1) or (3) [i.e., so far as we are concerned, "any grounds" revisions], the date the Secretary of State issues a notice that he is not revising the decision.
>
> …
> (5) The time limit specified in this regulation for bringing an appeal may be extended in accordance with regulation 32.
>
> **32.— Late appeals**
> (1) The time within which an appeal must be brought may be extended where the conditions specified in paragraphs (2) to (8) are satisfied, but no appeal shall in any event be brought more than one year after the expiration of the last day for appealing under regulation 31.

72. Secondly, section 9(5) of the SSA 1998 was in the same terms as it is now, so that where a decision was revised that started afresh the time limit for appealing.

73. It is also relevant to note for the purposes of the case law we are considering what regulation 6 of the 1999 D&A Regulations said about supersession decisions:

> **Supersession of decisions**
> **6.**—(1) Subject to the following provisions of this regulation, for the purposes of section 10, the cases and circumstances in which a decision may be superseded under that section are set out in paragraphs (2) to (4).
>
> (2) A decision under section 10 may be made on the Secretary of State's or the Board's own initiative or on an application made for the purpose on the basis that the decision to be superseded—
> (a) is one in respect of which—
> (i) there has been a relevant change of circumstances…
> (b) …
> (i) the decision was erroneous in point of law, or it was made in ignorance of, or was based upon a mistake as to, some material fact … [etc – the regulation goes on to set out other circumstances]

Wood v SSWP

74. *Wood* concerned a supersession decision. The Court of Appeal held that, as the Secretary of State could only supersede a decision on one of the grounds prescribed in the legislation, on appeal to the Tribunal against a supersession decision, the Tribunal needed to consider whether one of the grounds for supersession was established and, if not, the decision could not be changed. The Court of Appeal further confirmed (although this part of their decision was *obiter*: see Rix LJ at [55]) that a claimant has a right of appeal to the Tribunal under section 12 against a supersession decision made by the Secretary of State under section 10 of the SSA 1998, whether the decision resulted in a change to the original decision or not.

75. In the course of discussion of that latter point, the Court of Appeal considered what was required of the application or the decision in order to trigger the right of appeal. As already mentioned, it is important to note that at that time the provision for the right of appeal was simply that in section 12(1), i.e. that the right of appeal applied in respect of "any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above)". There was no wording in the legislation such as we now have in regulation 7 of the D&A Regulations limiting the right of appeal to: "only if the Secretary of State has considered on an application whether to revise the decision under section 9 of that Act". The only complicating factor for the Court of Appeal in *Wood* was whether the definition in section 12(9) of the reference in section 12(1) to "a decision under section 10 above" being "a decision superseding any such decision", coupled with regulation 31(2)(b) being drafted by reference to decisions that supersede (and not refusals to supersede), meant that only decisions that actually resulted in a change to the original decision could be appealed. That question the majority of the Court of

Appeal answered in the negative, holding that decisions refusing to supersede counted as supersession decisions and could be appealed. We are not concerned with that aspect of their decision in this case.

76. What the Court of Appeal said about what was needed to trigger a right of appeal is, however, relevant to these appeals. Rix LJ (who was in the minority on the supersessions issue) at [24] summarised the Secretary of State's position in that case as being that a right of appeal lay from every decision on an application for supersession save for those applications that are so hopeless that they "[do] not even amount to an application properly so called".

77. Rix LJ went on at [45]-[47] to consider passages from Hansard. At [48] he explained why he found the materials in the main to be unhelpful, but at [49] and [53] he concluded (albeit, strictly *obiter* as he indicates) that he accepted the Secretary of State's submission on this issue:-

> 52. … In any event, what these extracts show is that there was a positive intention that every decision under section 10 (in Lord Hardie's terms, every case where the Secretary of State was minded to act) should give rise to a right of appeal. Such decisions would include every case save that of the "hopeless" application where the Secretary of State would decline to act: thus it would include the arguable but unsuccessful application where the legislative criteria are not established and the even more arguable application where the legislative criteria are established but there is ultimately perhaps no change in the earlier decision, as well as the paradigm case where the legislative criteria are established and there is a change in the earlier decision.
>
> 53. That leaves open the question whether an application which is not even in the right form and therefore cannot possibly lead to a supersession can be said to lead to a "decision under section 10" at all. I would be prepared to assume that it can not and therefore earns no right of appeal.

78. Dyson LJ at [75] agreed that there needed to be a "properly constituted" application for supersession on the particular ground. Arden LJ held similarly at [62], albeit that her reasoning focused more closely on the wording of the legislation itself:

> 62. In my judgment, on its true interpretation Regulation 6 creates threshold criteria for consideration of an application for supersession. It sets out the conditions which must be fulfilled before a decision is made under section 10. Thus the Secretary of State can only consider whether to supersede an earlier benefit decision if the circumstances come within
> paragraph (2)(a) to (g) of Regulation 6. Thus, under paragraph (2)(a)(i) of Regulation 6, the decision by the Secretary of State to initiate a fresh decision under section 10, and any application for the purpose of the Secretary of State making any such decision, must be on the basis that there has been a relevant change of circumstances since the original decision. The words "on the basis that" mean "on the grounds that", and qualify

> "initiative" and "application". They denote the state of mind of the person triggering the section 10 process as manifested by their initiative or application. Thus, to qualify under regulation 6(2)(a), the change of circumstances, actual or anticipated, must be the bona fide ground for initiating that process. Accordingly, an application which is transparently not upon the ground of a relevant change of circumstances, or is otherwise misconceived for the purpose of Regulations 1 and 46 of the 1999 Regulations, is not one which meets the conditions in paragraph (2) of Regulation 6. In those circumstances, there is no obligation on the Secretary of State to proceed to make a decision under section 10, and no decision lies against his refusal to do so. Indeed, the court may strike out the application under Regulation 46.

R (IS) 15/04

79. *R (IB) 2/04* was the next decision in time after *Wood*, but it is convenient to set out first what the Tribunal of Commissioners decided in *R (IS) 15/04*. *R (IS) 15/04* concerned a claim for income support, originally decided on 16 February 1998. On 14 March 2002 the claimant applied for a revision of that award. On 12 April 2002 the Secretary of State decided to supersede the award with effect from 28 February 2002, but refused to revise the award. The First-tier Tribunal dismissed the appeal but did not deal with the claimant's argument that the original decision should have been revised for official error on the basis that the claimant had been mis-advised. It was common ground between the parties in that case, and the Tribunal of Commissioners so held, that a decision under section 9 of the SSA 1998 to revise or not revise a decision was not itself appealable under the SSA 1998 and, further, that the provision in regulation 31(2) of the 1999 D&A Regulations extending the time for appealing against the original decision in the case of a revision or refusal to revise did not "in terms" apply in the case of a decision not to revise for official error: ibid at [17]. The area of disagreement between the parties in that case was whether the failure to provide for a right of appeal against a refusal by the Secretary of State to revise on grounds of official error was in breach of Articles 6 and 14 of the ECHR. The Commissioners held it was not: Article 6 compliance was secured by the availability of judicial review of the refusal to revise (see [53]) and the Article 14 argument failed on other grounds that we need not detail.

R (IB) 2/04

80. Now we turn to *R (IB) 2/04*, decided two months earlier. In *R (IB) 2/04* the Tribunal of Commissioners considered four joined appeals. The issues for the Commissioners focused on supersession decisions, but the Tribunal of Commissioners made a number of observations about revision decisions in the course of their judgment. At [38]-[40], having referred to section 12(1) of the SSA 1998 and regulation 31 of the 1999 Decisions and Appeals Regulations, the Commissioners said this:

> 38. … In form, therefore, an appeal against a decision under section 9 is an appeal against the original decision (as either revised or not revised), not against the section 9 decision itself.
>
> 39. However, it was accepted by both Mr Drabble and Miss Lieven - again, in our judgment, that it follows from the reasoning of Rix and Dyson LJJ in *Wood* that, where the original decision has been revised adversely to the claimant, he is entitled to assert on appeal that no ground for revision existed. In other words, the claimant is not limited to arguing that the original decision as revised is wrong, but may argue that the original decision should remain effective as not having been properly revised. Whilst the question as to whether a claimant is entitled to appeal against a refusal to revise for official error (which is the only ground for revision in regulation 3(5) which a claimant would in practice wish to assert) will be the subject of separate consideration in our decision [what was reported as *R (IS) 15/04*], it was also common ground between Mr Drabble and Miss Lieven that, if and to the extent that a claimant is able to appeal against a decision refusing to revise for official error, he cannot succeed in the appeal without establishing that the original decision arose from an official error.
>
> 40. It follows that, when one looks at the substance (as opposed to the form) of an appeal following a revision or a refusal to revise under section 9, in a case where grounds for revision must be established, it is potentially misleading to describe the appeal as an appeal against the original decision as revised or not revised – because the claimant's appeal is not necessarily concerned simply with the merits of the original decision (as revised or not revised), but may be concerned with the prior
> questions of whether there was a ground for revision, and if so whether that ground is capable of leading to a different decision from the one which was originally made.

81. In the present appeals, Mr Royston in his skeleton argument on behalf of GD, having set out his client's position in terms that broadly accord with the law as we have found it to be in this judgment, made this point:

> 32. For the avoidance of doubt, GD's position is not an attack on the other proposition stated in *R(IB)* [1] *2/04*, §39 that '… where the original decision has been revised adversely to the claimant, he is entitled to assert on appeal that no ground for revision existed.' Since the FTT stands in the shoes of the decision maker, it follows that when determining an appeal against an original decision as revised, or a supersession decision, the FTT will share the decision maker's constraints. There are very sensible policy reasons for Parliament protecting social security claimants against groundless alteration of decisions by SSWP in this way. But a refusal to revise a decision does

[1] The Skeleton Argument refers to *R (IS)* but *R (IB)* is evidently meant.

not affect the scope of an appeal against the original decision, and there is no reason why it should.

82. This subsidiary argument of Mr Royston's has troubled us in our post-hearing deliberations. We are conscious that we did not hear full argument on this point, and that the point does not directly arise for decision in this case so that what we have to say about this submission is necessarily *obiter*. However, we consider that we need to address the point because it seems to us that Mr Royston's submission cannot be correct if we are right on the conclusions we have reached on the issues that did directly arise for decision in this case. This is because, if an appeal brought against a refusal to revise for official error must be dealt with on its full merits as an appeal against the original decision for the reasons we set out in this judgment, the same approach must apply regardless of whether the revision decision left the claimant in the same position or better or worse off. To hold otherwise gives a claimant a right of appeal against the revision decision itself that Parliament decided they should not have. As we have observed, the function of the revision decision in the statutory scheme, so far as the right of appeal to the Tribunal is concerned, has always been only to trigger the time limit for the purposes of exercising the right of appeal to the Tribunal against the original decision. That was the position both under the regime prior to the WRA 2012 and it still is, the differences being that now it is, if the Secretary of State chooses so to stipulate, mandatory for the Secretary of State to have considered revising the decision before the right of appeal arises, and the provisions in relation to time limits have also changed somewhat. Even though section 9(5) SSA 1998 provides that, where the Secretary of State revises a decision, the date of the revision is to be treated as the date of the decision for the purposes of time limits, it does not provide that the appeal becomes an appeal against the revision decision rather than the original decision (as revised). In accordance with well-established principles, the Tribunal on appeal then stands in the shoes of the original decision-maker and exercises the Secretary of State's original decision-making powers afresh. It seems to us that, in accordance with *R (IS) 15/04,* any challenge to the Secretary of State's power to revise the decision would have to be brought by way of judicial review.

83. We acknowledge that the Tribunal of Commissioners in *R (IB) 2/04* at [39] thought differently, but they did so on the basis of the reasoning of the Court of Appeal in *Wood* which concerned supersession decisions not revision decisions, and (as is apparent from [39] of *R (IB) 2/04*) the point was common ground between counsel in that case and not therefore argued. Further, the Tribunal of Commissioners in *R (IB) 2/04* acknowledged in [39] that they would in *R (IS) 15/04* be considering the question of whether there is a right of appeal against a revision decision, and it appears from [39] that the common ground between counsel in that case was in fact only common ground "<u>if and to the extent that</u> a claimant is able to appeal against a decision refusing to revise for official error" – we underline to emphasise what appears to have been the significant caveat on counsel's agreement. As the same Tribunal panel went on in *R (IS) 15/04* to decide that there is no right of appeal against a refusal to revise and that such a decision could only be challenged by way of judicial review, it seems to us that what they said about the Tribunal's jurisdiction

on appeals against revision decisions in *R (IB) 2/04* must be regarded as *per incuriam.*

84. In *R (IB) 2/04* the Tribunal went on to hold at [49]-[55] that a tribunal on an appeal against a supersession decision has power to substitute a revision decision, and that a Tribunal on an appeal against a revision decision has power to substitute a supersession decision. However, in *R (IS) 15/04* at [78] the Tribunal rowed back from that, holding that a Tribunal was not permitted to substitute a revision decision on an appeal against a supersession decision as that would be allowing 'by the back door' an appeal against a revision decision, which in that case the Secretary of State had expressly refused to make. The Tribunal did, however, consider that "It would have been a different matter if the Secretary of State had not made a decision (whether express or implied) on the issue of revision for official error", but the basis for the Commissioners' view in that respect was not explained. In *JA v Secretary of State for Work and Pensions (DLA)* [2014] UKUT 0044 (AAC) at [17] Judge Rowland observed that, if he had needed to decide whether a Tribunal on appeal against a supersession decision could substitute a revision decision, he would likely have referred the case to the Chamber President to consider whether a three-judge panel might be convened to resolve it. Unfortunately, this is not an issue that arises on this appeal either and we have not heard argument from the parties about it, but we record for completeness that it is apparent from what the Tribunal of Commissioners themselves said in [78] of *R (IS) 15/04* that they recognised that at least a portion of what they had said in *R (IB) 2/04* was incorrect.

85. At [88]-[97] of *R (IB) 2/04* the Commissioners went on to consider the powers of an appeal tribunal to make a decision less favourable to a claimant on an appeal against a supersession decision. The Commissioners decided that, applying section 12(8)(a) of the SSA 1998, and assuming that the possibility of such an adverse decision is "an issue not raised by the appeal" because the claimant would not be seeking an adverse decision, the tribunal was not bound to consider making an adverse decision. However, it was open to the Tribunal to do so, provided it acted fairly. In this respect, there is no doubt that *R (IB) 2/04* remains good law, and it seems to us that this is an important principle to bear in mind as it is this that provides some measure of safeguard for the interests of claimants as a result of an appeal to the Tribunal following a refusal to revise for official error in principle opening up the whole claim for reconsideration on its merits.

86. This principle would not, however, assist a claimant in cases where it is the Secretary of State, whether on the claimant's application or on his own initiative, who decides to revise a decision for official error in a way that is adverse to the claimant. In such cases, in the light of *R (IS) 15/04*, the claimant in our judgment has two options: (i) the claimant may apply for judicial review of the revision decision in order to argue that no ground for revision arose; or (ii) the claimant may appeal to the Tribunal, in which case the Tribunal will not deal with the question of whether the decision to revise was itself lawful, but will consider the claim afresh on its merits. While it might seem surprising in principle that a claimant may by that route end up (in substance) with the original decision on their benefits claim being revised retrospectively by the Tribunal in a way that could not lawfully be achieved by the Secretary of State

exercising his powers of revision under the legislation, as we have explained above, that is the consequence of Parliament having provided for the right of appeal to lie against the original decision (or the original decision as revised) rather than against the revision decision itself. Further, if the decision is revised adversely to the claimant that will be (or should be) because the claimant was not in fact entitled to the benefit. As such, the interpretation at which we have arrived is consonant with the general principle that the benefits system "is designed to ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled" (see *R (IB) 2/04* at [32]).

87. We acknowledge that GD's representatives, in response to the draft of this decision that was circulated to parties, identified four recent decisions in which the Upper Tribunal has, consistent with [39] of *R (IB) 2/04*, proceeded as if it is necessary for the First-tier Tribunal on an appeal against a decision where the Secretary of State has revised the decision adversely to the claimant to decide whether a ground for revision had been established. Those decisions are decisions of single judges of the Upper Tribunal: *MS v SSWP (DLA and PIP)* [2021] UKUT 41 (AAC) (Judge Wright), *SSWP v SV* [2023] UKUT 279 (AAC) (Judge Jacobs), *RA v SSWP (UC)* [2024] UKUT 207 (AAC) (Judge Wikeley) and *ED v SSWP* [2020] UKUT 352 (AAC) (Judge Perez). It is suggested that they would be binding on a First-tier Tribunal as to the approach to be taken on such appeals. However, in none of those cases was there any argument as to whether [39] of *R (IB) 2/04* was right as to what it said about appeals in such cases. The Upper Tribunal in each case merely proceeds on the assumption that it is. As such, they do not constitute binding authority on the point: see *R v Brent London Borough Council, Housing Benefit Review Board* (2001) 33 HLR 79 at [33]-[39]. Nor do they persuade us that there is any error in our reasoning in this case.

CJ and SG v SSWP

88. We now turn to the more recent case law. *R (CJ) and SG v SSWP (ESA)* [2017] UKUT 324 (AAC) is another three-judge panel decision, this time of Charles J, Judge Wikeley and Judge Wright, which was reported at [2018] AACR 5. That case was concerned with the situation where a claimant fails to seek mandatory reconsideration within the primary one-month time limit of the original decision, and does seek mandatory reconsideration within the maximum extension permitted of 13 months, but the Secretary of State refuses to extend time. It was argued by the Secretary of State in that case that in those circumstances a claimant's only recourse was to seek judicial review of the Secretary of State's refusal to extend time, while the claimants argued that the Secretary of State's refusal to extend time was itself a decision considering an application to revise and thus sufficient to trigger the right of appeal to the Tribunal having regard to the provisions of the 1999 D & A Regulations, which were the relevant regulations in those cases. Regulation 3ZA of those regulations includes the same provision as regulation 7 of the D&A Regulations with which we are concerned in this case so that, where the Secretary of State has so stipulated in the original decision, "a person has a right of appeal under section 12(2) of the 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 the Act". The three-

judge panel found in favour of the claimants, holding that a decision by the Secretary of State refusing to extend time for mandatory reconsideration was itself a consideration by the Secretary of State on an application as to whether to revise the decision under section 9 so as to trigger the right of appeal. The Upper Tribunal observed (at [88]) that their interpretation accorded with what the Secretary of State had identified in that case as the Parliamentary purpose of enabling the Secretary of State to have "the first opportunity to consider the correctness of the decision, including any new material which is often submitted on an appeal, and thereby prevent the need for the case to progress to appeal", while at the same time maintaining claimants' access to the Tribunal in a jurisdiction where, as a result of vulnerability, many claimants have difficulty complying with time limits.

89. The three-judge panel in *CJ and SG* did, however, include the following in a footnote to their [52] in the passage where they addressed what was required in order to trigger the right of appeal to the Tribunal:

> Although it was not the subject of any real argument before us and did not arise on the facts of either of the two cases, we consider that the maximum extension of time "as may be allowed under regulation 4", per regulation 3(1)(b)(iv) of the 1999 Regulations, may provide the basis for holding that a revision request made after the maximum period of 13 months does not constitute "an application for revision" under regulations 3(1)(b) or 3ZA(2) of the 1999 Regulations, and so does not fall within Section 12(3A) of the 1998 Act.

90. The three-judge panel returned to this point in the concluding section of their judgment. At [90]-[94] they indicated that they were satisfied their decision in that case was right as regards applications for revision made within 13 months even though they recognised that, if they followed the logic of their decision through to applications for revision brought after the initial 13 months, it would result in a claimant being able to trigger a late right of appeal at any time, a result that they considered could not have been intended by Parliament:

> 90. We acknowledge that, as with initial claims and appeals to the F-tT, Parliament would have intended time limits being set for a revision of the original decision on the merits (a mandatory reconsideration) but in our view an intention to rule out a full merits appeal on the basis that an extension of time was not granted under the 1999 Regulations would frustrate the essential and driving purposes set out in the previous paragraph. To avoid this result we have concluded that on their true interpretation the MR regime under the 1998 Act and the 1999 Regulations is that any refusal to revise an application for MR made under the 1999 Regulations triggers the right to appeal to the F-tT.
>
> 91. We acknowledge that different issues arise on the non-extendable 13 month period (which is mirrored by the F-tT Rules). In our view, the likelihood of there being many cases in which a claimant applies near the end of that

period or after it and so sets time running again after that length of time is small.

92. We recognise that in the case of an application made outside the 13 month period it may be said that an application for a revision within regulation 3ZA (2) has not been made (and see further our footnote 1 to paragraph 52 above). This issue did not arise on the facts of either of the cases before us and was not the subject of any detailed argument. So it is for another day.

93. However, in our assessment of the overall statutory scheme we have considered whether our conclusion is undermined if an outside 13 month application is an application for revision. On that hypothesis we have decided that a conclusion that Parliament would not have intended that a claimant could start time for an appeal to the F-tT running again by making such an application for revision does not mean that applications made late but within the non-extendable 13 month period that are refused or not considered on the merits of the claim for benefit because time is not extended do not trigger a right of appeal.

94. We have reached this view because we have concluded that this consequence does not undermine our analysis founded on what will inevitably be the far greater number of late applications that are made before the expiry of the outside 13 month time limit.

PH and SM v SSWP

91. The three-judge panel's footnote to [52] was considered by Judge Poole in the subsequent case of *PH and SM v SSWP (DLA) (JSA)* [2018] UKUT 404 (AAC). The decision in *PH and SM* was also reported (at [2019] AACR 14). In accordance with the Upper Tribunal's reporting practice at the time, it is thus (like the *CJ* decision) a decision that commanded the broad assent of the majority of the salaried judiciary in the Chamber and so we treat it as carrying added precedential weight, although it is not binding on us.

92. *PH and SM* concerned the situation where a claimant makes a request for mandatory reconsideration more than 13 months after the Secretary of State's original decision. Judge Poole concluded that in PH's case (see her summary at [4]) the Tribunal did not have jurisdiction to consider the appeal where the application for mandatory reconsideration had been made outside the maximum 13-month time limit for applying to the Secretary of State on "any grounds" under regulation 5. In contrast, in SM's case, where the application for mandatory reconsideration expressly alleged official error, Judge Poole considered (as she put it in [5] of her decision) that the Tribunal would have had jurisdiction to determine the appeal "on its merits" if the claimant had applied to the Tribunal within one month of the mandatory reconsideration decision, but as the claimant had applied outside that time limit, the Tribunal would only have jurisdiction if it considered it appropriate to extend time applying the provisions of the Tribunal Procedure Rules. It was agreed between the

parties in that case that on appeal the Tribunal would need to decide whether or not there was "official error" in the original decision of the Secretary of State and so Judge Poole remitted the appeal to the First-tier Tribunal for reconsideration on the basis that the First-tier Tribunal should consider, first, whether the original decision was officially in error; secondly, if it was, whether time should be extended; and, thirdly, if both those conditions were satisfied, whether the appeal should be allowed on its merits.

93. We observe immediately that the first issue that Judge Poole identified for the Tribunal to consider on remission – i.e. whether the original decision involved an official error – was a point on which there had been no argument. It was based on agreement between the parties and, we suspect, on what appears to have been a misunderstanding that has been widespread following the decisions in *Wood, R (IB) 2/04* and *R (IS) 15/04*, that appeals in cases where there has been an application for revision on grounds of official error are to be treated in the same way as appeals against supersession decisions. We therefore disagree with this aspect of Judge Poole's decision in *PH and SM.*

94. In the course of her judgement, Judge Poole at [11] also addressed the footnote to [52] of *CJ* set out above and concluded (without discussing the reasoning of the three-judge panel in this respect) that it was correct so far as "any ground" revisions were concerned, i.e. that it was correct that an "any ground" application for revision made more than 13 months after the original decision would not be 'valid' and thus would not trigger a right of appeal. However, she considered that it was not correct so far as "any time" revision applications were concerned. She went on at [12] to hold that the jurisdiction of the First-tier Tribunal to hear an appeal where the application for revision was made after the 13-month period would therefore depend on whether the application was in substance an "any ground" request or an "any time" request. She further stated that "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 Child Support Decisions and Appeals Regulations so that there was no jurisdiction to hear an appeal, by application of section 12(3A) of the [SSA 1998]". She referred to the Court of Appeal's decision in *Wood* as authority for that proposition.

95. Judge Poole's decision on this point rejected the Secretary of State's position in that case; as recorded at [14]-[15], the Secretary of State's practice, where an application was made more than 13 months after the original decision, was to consider whether there had been an "official error" even if that was not raised by the claimant. Judge Poole considered the Secretary of State's approach was wrongly collapsing the distinction between "any grounds" and "any time" applications for revision.

96. It is not, however, entirely clear from Judge Poole's decision what she considered was necessary for an "any time" application for revision to have been valid so as to open up the Tribunal's jurisdiction. At [5] she suggested that jurisdiction depends on official error being "made out on the facts" (and in remitting the appeal she gave directions to the Tribunal to that effect at [5.1]), but at [12] she said that "what is

important is the substance of the request" and indicated that it was for the Tribunal to decide whether the application advances an "arguable case" for official error or is "not spurious". At [15] she said that what matters is whether the application raises what is "in substance" an "any time" ground for revision as distinct from an "any ground" application.

97. We return to this issue below when discussing what is necessary for an application to trigger the right of appeal.

98. On the other hand, in *PH and SM*, Judge Poole also rejected (at [19]-[21]) the Secretary of State's argument that sought to restrict the time limit provisions in regulation 22 of the Tribunal Procedure Rules so as to preclude any appeal made more than 13 months after the original decision. Judge Poole rejected the Secretary of State's submissions in that respect, holding that the legislation should be given the meaning it has on its face so that the time limit starts to run from the date of the revision decision. We agree with Judge Poole in this respect for the reasons we have explained above. We add this. At [19] of her decision, Judge Poole observed:

> The SSWP's stance on jurisdiction enabled claimants to resurrect appeal rights long after a decision had been taken, simply by requesting mandatory reconsideration on any basis. Faced with this potentially chaotic situation, the SSWP argued for an interpretation of the Tribunal Rules which would prevent this happening. I consider the SSWP's approach to be flawed. I accept that a situation where appeal rights may be manufactured by claimants many years after a decision has been taken, simply by requesting mandatory reconsideration, may be problematic. But the answer to this problem is by applying the statutory wording of the jurisdiction provisions. The jurisdictional time limits provide the necessary control to prevent many appeals proceeding long after the circumstances happened on which the decisions they appeal were based. It is true that in Regulation 3(5) situations such as official error, more generous time limits will apply, but that seems to me to be the clear intent of the 1999 Regulations for this limited category of cases. If there is no jurisdiction (for example where a Regulation 3(1) or 3(3) mandatory reconsideration application has been brought outwith the basic 13 month period), then the appeal should be struck out under Rule 8, and Rule 22 time limits do not fall to be applied.

99. We acknowledge that the effect of our decision on this appeal is, now with the Secretary of State's agreement, to create what Judge Poole described as a "potentially chaotic situation … where appeal rights may be manufactured by claimants many years after a decision has been taken, simply by requesting mandatory reconsideration…". However, in common with Judge Poole, we consider that this is indeed the proper interpretation of the legislation and the Secretary of State has also now reached that view. As we have already observed at [67] above, we do not consider the 'potential chaos' is likely to be very significant because each claimant is still only permitted to exercise their right to appeal against the original decision once, and our approach is consonant with the purpose of the mandatory reconsideration provisions in that it in principle permits the Secretary of State always

to have the first opportunity to consider any grounds for revising a decision (or superseding a decision) before the claimant proceeds to the Tribunal.

The post *PH and SM v SSWP* decisions

100. The next decision in time is Judge Jacobs' decision in *YA v SSWP* [2022] UKUT 143 (AAC). Like TR's case in these proceedings, *YA* concerned an appeal as a result of the *MH* LEAP exercise. By the time the appeal was before the Tribunal *RJ* had also been decided. The appeal in the Upper Tribunal was a supported appeal and the judgment does not detail the full underlying facts of the case. For present purposes, it suffices to say that Judge Jacobs accepted the submission of the Secretary of State that the Tribunal in that case had erred in law because it had on appeal, following the Secretary of State's decision on the LEAP exercise, dealt with the appeal as if it was an appeal only against a decision of 2019, when in fact the Secretary of State's decision on the LEAP exercise had refused to revise two previous decision, one in 2017 and one in 2019. Purportedly applying *PH and SM*, the case was remitted to the Tribunal to reconsider the case as an appeal against the 2017 decision.

101. Next is a decision of Judge Hemingway in *JN v SSWP* (UA-2022-000051-PIP). This was another appeal arising out of the *MH/RJ* LEAP exercise. The Tribunal had regarded itself as limited only to considering whether the original decision was in error in the light of the subsequent decisions in *MH* and *RJ*. The Secretary of State apparently agreed that the Tribunal had erred in that respect, and so did Judge Hemingway. Without referring to any of the authorities that we have set out above, he concluded at [16] that a Tribunal, "when considering on appeal a decision made as a consequence of a review in light of the decisions in *MH* and *RJ*, is not restricted to simply considering whether the decision under challenge ought to have been different as a result of what was said in those decisions of the Upper Tribunal. Other appellate authorities may be considered. The F-tT was simply standing in the shoes of the original decision-maker who had made the decision under appeal, and this required it reach its own decision on all matters before it whether of fact or law". Thus, it appears that Judge Hemingway's reading of the legislation, apparently free of authority, was the same reading at which we have arrived on this appeal.

102. Next is *GJ v SSWP (PIP)* [2022] UKUT 340 (AAC), a decision of Judge Wikeley. This was another appeal arising out of the *MH/RJ* LEAP exercise. Judge Wikeley referred with approval to Judge Poole's analysis of the law in *PH and SM*: see [34]. The First-tier Tribunal in the decision under appeal in that case had directed itself that it needed to be satisfied that there was an official error or other ground for an "any time" revision before it could consider the appeal on its merits. It directed itself that it was not sufficient if the claimant had raised an arguable case of official error: see [37]. Judge Wikeley held that the First-tier Tribunal's self-direction in this respect was correct and dismissed the appeal on that ground: see [38]-[39]. Judge Wikeley thus applied Judge Poole's decision in *PH and SM* as he understood it to be, without adding any further reasoning. It does not appear that he heard submissions on the correctness or otherwise of this aspect of Judge Poole's analysis. We consider his decision to be flawed for the same reasons that we have already set out above in

relation to *PH and SM.* Judge Wikeley went on to consider whether the Tribunal had taken the correct approach to the *Adesina* principle in asking itself whether it should extend time for appealing the original 2017 decision in that case well beyond the original 13-month time limit and, as we have previously noted, questioned whether the *Adesina* principle could properly apply in this area. We do not need to concern ourselves on this appeal with that aspect of his decision.

103. *DB v SSWP (PIP)* [2023] UKUT 95 (AAC) is a decision of Deputy Judge Ovey. This was another case arising out of the *MH/RJ* LEAP exercise. The First-tier Tribunal in that case had concluded that it could not consider an appeal against the original decision on its merits because it was not satisfied that there had been official error in that decision. Judge Ovey referred to both *PH and SM* and *GJ*. She noted at [77] that there was an inconsistency between Judge Wikeley's decision in *GJ* and Judge Poole's decision in *PH and SM* because Judge Wikeley had proceeded on the basis that a Tribunal needed to be satisfied there was an official error in the original decision in order to have jurisdiction, whereas Judge Ovey's reading of *PH and SM* (which she preferred to *GJ*) was that all that was required for the claimant to have a right of appeal to the Tribunal "on the merits of the issues raised by the application for revision" was for the Secretary of State to have "considered a properly constituted application for revision on an 'any time' ground". As we have noted above, it is not wholly clear that *PH and SM* was to the effect that Judge Ovey understood it to be, but in any event we note that Judge Ovey essentially shared the view that we have reached in these proceedings that, on an appeal in such cases, the Tribunal is considering an appeal against the original decision on its full merits. As we read Judge Ovey's reference to "the merits of the issues raised by the application for revision" (at [77]), this is just a reference to section 12(8)(b) of the SSA 1998 and, as such, her view accords with our own that, although in principle a late appeal of this sort is a full merits appeal in the same way as a 'standard' appeal, a late appeal (in the same way, in fact, as a 'standard' appeal) does not automatically lead to a full review of the merits of the original decision because the Tribunal only needs to consider the issues actually raised by the claimant on appeal.

104. Finally, we come to two more decisions of Judge Wikeley. In *CW v SSWP (PIP)* [2023] UKUT 297 (AAC) Judge Wikeley was dealing with another appeal arising out of LEAP exercises. The First-tier Tribunal had held that it was not able to deal with the appeal as a full merits appeal against the original decision because its jurisdiction was limited to the issues raised by the potential official error. Judge Wikeley agreed with the Secretary of State that the Tribunal had erred in this respect because the Secretary of State's decision on the revision application "could properly be construed as a decision given on a non-hopeless application for an any-time official error revision of [the original decision]" and accordingly the Tribunal had full jurisdiction over the merits: see [40]-[43]. Judge Wikeley acknowledged that there was still some uncertainty in the case law on this issue (see [41]) but did not consider he needed to resolve that in this case. In essence, he followed the approach taken by Judge Ovey in *DB* which, as we have noted, rejected the approach that he had taken in *GJ* and may or may not have been in accordance with what Judge Poole decided in *PH and SM*.

105. The last decision is *SSWP v TR* [2025] UKUT 001 (AAC). This was a complicated case involving attempts by a claimant to challenge three different decisions of the Secretary of State. The case arose out of LEAP exercises. We do not need to get into the detail of the case for our purposes. In general terms, it is a reminder of the importance in complex cases of the Tribunal considering very carefully the correspondence that has passed between a claimant and the Secretary of State in order to identify what applications were made and what decisions were taken. So far as the specific matters with which we are concerned, however, the first point to note is that at [36] and [42] Judge Wikeley relied on *PH and SM* to hold that two of the claimant's applications for revision were not 'valid' applications because they were in substance made on an "any grounds" basis but after the expiry of the primary 13-month period for making such an application so that only "any time" grounds for revision were available to her. At [39] and [42], Judge Wikeley applied the same logic to construe another request for revision by the claimant as relating only to her 2017 claim because that was the only claim affected by the LEAP exercise, i.e. Judge Wikeley proceeded on the basis (as he had in *GJ*) that unless official error was established in relation to a decision there was no means of challenging it late.

106. That he proceeded on this basis is clear also from [44] where he explained that, from that point in the decision onwards, he was considering the appeal on the alternative basis that, as submitted by the claimant, the claimant "had lodged a valid in-time appeal against all three PIP decisions …". He stated: "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'". Judge Wikeley then went on at [48]ff to consider whether a request for revision must expressly or implicitly identify official error as a ground for revision. At [49] he quoted from [12] of Judge Poole's decision in *PH and SM* and at [50] he continued:

> … 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.

107. Judge Wikeley indicated that he did not need to resolve the dispute between the parties in that case as to whether the application needed in substance to be an application for revision on ground of official error. However, as can be seen, he proceeded on the basis, apparently agreed by the parties, that it was necessary for the decision under challenge actually to have been made in consequence of official error in order for the Tribunal to have jurisdiction over the appeal on a full merits basis. For the reasons we have set out above, we consider that approach to have been erroneous.

108. Finally, Judge Wikeley dealt in *TR* with a further point, which is raised also in GD's case in these proceedings, as to whether the Secretary of State's standard wording giving notice of the requirement to apply for mandatory reconsideration before appealing to the Tribunal, satisfies the requirements for such a notice in regulation 7(3)(a) of the D&A Regulations in terms of informing the claimant of the time limit for making such a request. Judge Wikeley decided that it did and that it suffices that the Secretary of State gives notice of the primary one-month time limit and does not provide details of the bases on which time may be extended. An appeal to the Court of Appeal against Judge Wikeley's decision in *TR* was commenced, but (we understand) is not proceeding.

What is required in order to trigger the right of appeal to the Tribunal in cases to which mandatory reconsideration applies

109. This issue was one of the issues that this three-judge panel was convened in order to determine, although in the event it is not a point that is strictly in issue between the parties in either TR's or GD's case. There are, however, cases stayed behind this case to which this issue is relevant, and the parties have made submissions on the issue. Moreover, as is apparent from the preceding section of our judgment where setting out the relevant case law necessarily included setting out the case law relevant to this topic, it is difficult to divorce this issue from the points of law that are directly in issue in the cases before us. We therefore set out our conclusions so that they may serve as a guide in future cases.

110. We begin with the observation that section 12(3A) of the SSA 1998 permits the making of regulations that "in such cases or circumstances as may be prescribed, there is a right of appeal under subsection (2) in relation to a decision only if the Secretary of State has considered whether to revise the decision under section 9". Section 12(3A) does not include the words that appear in regulation 7(2) of the D&A Regulations "considered *on an application"* (emphasis added). That regulation 7(2) is *intra vires* section 12(3A) is clear from section 12(3B) which expressly permits the regulations to provide that an application is a necessary element. The decision to limit the effects of regulation 7(2) to where the Secretary of State has considered whether or not to revise on the basis of an application does not leave claimants without a right of appeal if the Secretary of State decides to act of his own motion to revise a decision (whether on "any grounds" or "any time" grounds), because if the Secretary of State decides to revise a decision at any time, that restarts the clock for appealing to the Tribunal by virtue of section 9(5) of the SSA 1998. In such cases,

the revision decision itself would be the trigger for the start of the normal one-month time limit for appealing, unless the Secretary of State stipulates in that decision that mandatory reconsideration applies so that the claimant must apply again for a revision of the revision before appealing to the Tribunal.

111. The cases before us are both cases in which an application of some sort was made that the parties agree to be sufficient to trigger a right of appeal. The issue of principle that we now go on to consider is whether there are any particular requirements for an application before it will trigger the right of appeal under regulation 7(2). Many of the cases that we have reviewed touched on this topic, but none of them are binding on us, although some carry more persuasive weight than others. The only decision of a superior court of relevance is the decision of the Court of Appeal in *Wood*. As noted above, *Wood* was dealing with the previous legislation in which there were no equivalents to section 12(3A), regulation 7 of the D&A Regulations or regulation 22 of the Tribunal Procedure Rules. There is nothing therefore in that decision that is binding on us in relation to this issue. However, the Court of Appeal did consider what was required in order for a decision of the Secretary of State to constitute a refusal to supersede against which an appeal would lie. Regulation 6 of the 1999 D&A Regulations was equivalent to Part 3 of the current D&A Regulations as it set out the bases on which decisions may be superseded. As we read the judgments of the Court of Appeal in that case, the Court concluded (albeit this part of their decision was *obiter*) that it was necessary for there to be a properly constituted application for supersession on the particular ground relied on. Rix and Dyson LJJ went no further than that, while Arden LJ in [62] tied her reasoning more specifically to the terms of regulation 6 of the 1999 Regulations as follows (the full passage we have already set out in full at [78] above):

> … Regulation 6 creates threshold criteria for consideration of an application for supersession. It sets out the conditions which must be fulfilled before a decision is made under section 10. Thus the Secretary of State can only consider whether to supersede an earlier benefit decision if the circumstances come within paragraph (2)(a) to (g) of Regulation 6 [set out above] … The words "on the basis that" mean "on the grounds that", and qualify "initiative" and "application". They denote the state of mind of the person triggering the section 10 process as manifested by their initiative or application. Thus, to qualify under regulation 6(2)(a), the change of circumstances, actual or anticipated, must be the bona fide ground for initiating that process. Accordingly, an application which is transparently not upon the ground of a relevant change of circumstances, or is otherwise misconceived for the purpose of Regulations 1 and 46 of the 1999 Regulations, is not one which meets the conditions in paragraph (2) of Regulation 6. In those circumstances, there is no obligation on the Secretary of State to proceed to make a decision under section 10, and no decision lies against his refusal to do so. Indeed, the court may strike out the application under Regulation 46.

112. The Court of Appeal in that decision thus identified the possibility of the Secretary of State being able simply to reject a purported application that was not advanced in

good faith, and transparently on one of the prescribed grounds, or which was otherwise misconceived, and concluded that decision would not be appealable on the basis that it did not in law constitute a decision on the relevant application. However, as can be seen, Arden LJ (in particular) focused on the wording of regulation 6 itself, which provided in material part: "A decision under section 10 may be made on the Secretary of State's … own initiative or on an application made for the purpose on the basis that the decision to be superseded … is one in respect of which … there has been a relevant change of circumstances". Arden LJ construed this wording as giving the Secretary of State power to supersede a decision only if the Secretary of State received an application of the appropriate type. Given that regulation 6 itself did indeed on its face prescribe that an application for supersession must be made for a particular purpose, and then listed the possible grounds for supersession, it seems to us that the Court of Appeal's decision was plainly correct as regards the legislation as it stood at that time. Although Rix and Dyson LJJ did not in their reasons focus on the precise wording of regulation 6, it seems to us that their conclusion cannot be divorced from the legislative scheme as it stood at that time.

113. The current legislation, however, is worded quite differently as we have noted above. The "any grounds" provision in regulation 5 simply permits the Secretary of State to revise the decision where "an application for a revision is received" within the particular period, with no specification as to type of application. The "any time" grounds for revision, such as "official error" in regulations 8 and 9 simply permit the Secretary of State to revise a decision when the particular circumstances apply. There is nothing prescribing the type of application. Likewise, as already noted, regulation 7(2) just refers non-specifically to the Secretary of State considering "on an application" whether or not to revise the decision. Regulation 22 of the Tribunal Procedure Rules also does not specify the type of application.

114. When Judge Poole in *PH and SM* adopted the *Wood* approach, holding that there had to be a "properly constituted" application to revise for official error in order to generate a right of appeal to the Tribunal, whether one that was "made out on the facts", or which advanced an "arguable" or "not spurious" case or otherwise, she did so without addressing the difference in wording between the legislation that was before the Court of Appeal in *Wood* and the current legislation.

115. The three-judge panel of the Upper Tribunal in *R (CJ) and SG v SSWP* in contrast did consider in detail the wording of the present regulations and concluded, for applications within the 13-month time limit that it suffices to constitute consideration of an application by the Secretary of State if he considers the application but rejects it on the "preliminary issue" of time rather than considering it on its merits. In the course of that decision, the three-judge panel of the Upper Tribunal observed at [45] that there was nothing in section 12(3A) that required the regulations made thereunder to limit the right of appeal only to the situation where "the Secretary of State has considered [on the basis of an in-time application for revision] whether to revise the decision under section 9". At [52], the three-judge panel observed: "This reading of regulation 3(1) in our view lends support to the common ground before us that an application for a revision is not deprived of its character of being an

application for revision simply by being late." At [53] they continued, "there is no hint that it must be an application for a revision that satisfies a time limit. Indeed, given the structure of regulation 3, that would be illogical - as a revision application may be made under regulation 3(5), which as an 'any time' application has no time limit". The decision of the three-judge panel in that case thus recognises that, on its face, the current legislation deals with both "any grounds" and "any time" applications for revision in the same way. The three-judge panel further recognised at [93] that the logic of its decision in that case would be that a claimant could trigger a right of appeal at any time after 13 months by making an application for revision (quoted above at [88]-[89]). Even though the panel considered that result would be contrary to the "intention of Parliament", the three-judge panel did not let that sway them from their conclusion that their approach was correct as regards applications made before the 13-month mark.

116. The parties in these proceedings are in agreement that what is required to constitute an application for the purposes of regulation 7(2) is in general terms a low hurdle. They both broadly adopted the *Wood* and *PH and SM* approach. Mr Skinner for the Secretary of State, in particular, provided vivid examples in his skeleton argument of communications that he submitted "would not amount to a valid any time revision application on the basis of 'official error'" as follows:

> "i. "The decision was wrong, please look at it again." This is insufficiently particularised to enable the SSWP to connect it with there being a statutory any time ground of revision.
> ii. "I now think that the decision made in 2019 to disallow my PIP claim was wrong because I know my evidence was good and so you could not have considered it properly, please look at it again." While this appears to point to an 'official error', the logic is incapable of demonstrating one.
> iii. "Your decision arose from an official error because it was made on a Wednesday, which is my unlucky day". As above, it points to an 'official error', but the logic is self-evidently flawed.
> iv. "Your decision leaves me in hardship and is unjust". Again, this cannot be logically connected with any statutory any time ground.
> v. "Your decision is inconsistent with the evidence." This is insufficiently particular of itself to demonstrate 'official error'.
> vi. "Your decision has much the same effect on me as a sanction, and therefore it can be revised under regulation 14 of the [D&A] Regulations." This is logically unconnected with the statutory grounds for an any time revision.
> vii. "Your decision arose from an official error because it is inconsistent with case law decided since your decision". This is incapable of amounting to an 'official error' because it is excluded by Reg 2 of the [D&A Regulations] as "an error of law which is shown to have been such by a subsequent decision of the Upper Tribunal"."

117. In the course of our deliberations, we have been concerned that, if we accept (in some form) the parties' proposed approach, we would be reading requirements into the legislation that are simply not there on its face. It troubled us that, if we and the

parties are right that on an appeal against a decision following the Secretary of State refusing to revise a decision on "any time" grounds the Tribunal exercises a full merits jurisdiction, it could be said to flow logically from that that an application for revision (whenever made) does not need itself to identify any particular ground for revision in order to constitute an application that is capable, once the Secretary of State has considered it, of triggering a right of appeal to the Tribunal. This would be because the basis on which we arrived at that decision was that the right of appeal remains a right of appeal against the original decision only (as revised or not) and the Tribunal's jurisdiction on appeal is to stand in the shoes of the Secretary of State and to take that decision *de novo* on a full merits basis. As such, the grounds on which the Secretary of State is empowered to revise a decision become irrelevant on appeal as the powers of the Tribunal are not so constrained.

118. However, on further reflection, we are satisfied that it is necessary for the application to raise in substance a request for revision that is capable of being in fact or law an official error (or other relevant "any time" ground for revision), albeit that it need not raise an arguable case. This is because of the terms of regulation 6 of the D&A Regulations and because of what the three-judge panel said in *R (CJ) and SG v SSWP* about it evidently not being "the intention of Parliament" to enable claimants to generate a right of appeal by making an "any grounds" application for revision outside the 13-month time limit. Although we would point out that the provisions that contain the crucial detail in relation to the grounds for revision and the operation of the time limits are all in regulations and not in the primary legislation, so that what is relevant is not the intention of Parliament but that of the Parliamentary draftsperson, we do agree with the three-judge panel in *R (CJ) and SG* that this cannot have been the intended effect of the regulations. If it was, it would render largely nugatory the detailed provision as to the various grounds on which the Secretary of State may revise a decision, as well as regulation 6 with its strict conditions on the circumstances in which time can be extended for an "any grounds" revision. While it may be that the regulations simply failed to capture the legislative intent, we consider that, if the "any time" revision regulations are read together in context with regulation 6, the three-judge panel in *R (CJ) and SG* were right in their [52] footnote that an application for revision on "any grounds" under regulation 5 will not be valid if it is brought after the 13-month point. It must follow that, in order for an application for revision brought after that point to be valid so as to trigger the right of appeal under the time limits provisions, the application must in substance be an application on one of the specific "any time" grounds as, if it is in substance an "any grounds" application for revision, it will in our judgment not be valid for the reasons that the three-judge panel in *R (CJ) and SG* suggested.

119. Although the role of the parts of the regulations dealing with revision and time limits is significantly reduced as a result of the decision we have made about the Tribunal's jurisdiction on appeal being a "full merits" jurisdiction, we do therefore consider that they remain relevant to the limited extent that, in order to trigger a late right of appeal to the Tribunal, an application must raise in substance one of those grounds on a basis that, if made out, would be capable of being in fact or law an official error or other "any time" ground for revision. The application does not, however, have to be arguable in order to trigger a right of appeal. There is nothing in the legislation to

indicate such a threshold is required, and to hold otherwise would in our judgment be inconsistent with the decision of the three-judge panel in *R (CJ) and SG* that an application made within the initial 13-month period is not deprived of the character of being an application just because it is out of time. We add that it seems to us that Mr Skinner's list of applications that would not constitute valid "any time" applications for revision (set out at [115] above) provides an appropriate guide that may assist Tribunals in adjudicating on this issue.

120. Further, we observe that, so far as the Tribunal is concerned, what opens the door to an appeal is not (or not necessarily) the form of the application, but whether the Secretary of State has considered that application. If the Secretary of State has considered the application as if it is an application for revision of the decision, that is likely to be the end of the matter so far as the Tribunal is concerned, having regard to regulation 7(2) of the D&A Regulations and regulation 22 of the Tribunal Procedure Rules. In these circumstances the Tribunal should simply proceed to deal with the appeal as it would any other. It will only be in what are likely to be the relatively rare cases that the Secretary of State has either not responded to the application at all or has regarded the application as being an "any grounds" application for revision outside the 13-month period, and rejected it on that basis, that the Tribunal will need to consider whether the Secretary of State has properly construed that application or not. If the Secretary of State has regarded the application as being an "any grounds" application, and the Secretary of State's reading of the application is right, the appeal should be dismissed for lack of jurisdiction. If the Tribunal decides that, properly construed, the application is an "any time" grounds application, the appeal should be admitted, provided (of course) that the appeal has been made within time applying regulation 22 of the Tribunal Procedure Rules and there are no other grounds for striking it out. If the Secretary of State has not responded to the application at all, so that it cannot be said that the Secretary of State has "considered on an application whether to revise" the decision, then the Tribunal will not have jurisdiction unless and until the Secretary of State has considered the application. The First-tier Tribunal may wish to consider staying any such case and issuing directions to allow the Secretary of State time to consider his position.

Conclusion on the issues of principle

121. It follows that, in relation to the issues identified for consideration in these cases, we have decided:

    a. Where an application for revision has been made more than 13 months after the original decision or supersession decision, whether the First-tier Tribunal has jurisdiction on appeal depends on the Secretary of State having considered an application that is in substance a request for revision that raises grounds which, if made out, would be capable of being in fact or law an official error (or other relevant "any time" ground for revision);

b. If the Tribunal decides that, properly construed, the application was not such an application, the Tribunal must strike out the appeal under rule 8(2)(a) of the Tribunal Procedure Rules for lack of jurisdiction;

c. If an application has been made but the Secretary of State has not yet considered it, the Tribunal may consider staying the appeal to allow the Secretary of State to do so;

d. If the Secretary of State has considered such an application, the primary one-month time limit (with maximum 13-month extension) for appealing to the Tribunal under regulation 22 of the Tribunal Procedure Rules applies, and it begins to run from the date the claimant is sent notice of the revision decision;

e. On such appeals, if the appeal is brought within that time limit (including any extension), then:

    i. if the application was for revision of an original decision under section 8, the First-tier Tribunal has jurisdiction on a "full merits" and *de novo* basis and must deal with the case as if it is standing in the shoes of the Secretary of State on the date that the Secretary of State made the original decision under section 8, save that (by virtue of section 12(8)(a) of the SSA 1998) it need not consider any issue not raised by the appeal;

    ii. if the application was for revision of a supersession decision under section 10, the First-tier Tribunal's jurisdiction is similarly "full merits" and *de novo* but the Tribunal is standing in the shoes of the Secretary of State on the date that the Secretary of State made the supersession decision and so is limited, as the Secretary of State was when taking the decision, to considering whether one of the legislative grounds for supersession has been established and, if so, what the consequences of that should be applying the legislative scheme.

Disposal in TR's case

122. Applying those principles to TR's case, there is no doubt that the Tribunal had jurisdiction to hear her appeal as a result of the Secretary of State having considered an application for revision on grounds of "official error". It should, however, have considered it on a full merits basis, albeit subject as usual to section 12(8)(a) and (b) of the SSA 1998 so that the Tribunal need not consider any issue not raised by the appeal and must not take into account any circumstances not obtaining at the time of the original section 8 decision of 26 May 2017 (save to the extent that they shed light on the position at that time).

123. Mr Skinner for the Secretary of State sought to argue that in TR's case the Tribunal's error in not considering her appeal on its full merits was not material because (we

summarise) she is very unlikely to secure sufficient points to entitle her to PIP. However, we do not consider that we are in a position to make that decision. We are not in the situation that we would be if this had been a 'standard' appeal where the Tribunal considered the full merits of the case and it is apparent that the issue on which the appeal succeeds will not be sufficient to make a difference to the claimant's entitlement to PIP. In this case, TR has not yet had the benefit of a full merits appeal to the Tribunal. She is entitled to that and we therefore set the decision of the previous Tribunal aside and remit it accordingly.

Disposal in GD's case

124. There is no dispute between the parties that in GD's case the decision of the First-tier Tribunal must be set aside and the case remitted for reconsideration on its full merits as an appeal against the 16 April 2018 supersession decision. There is in GD's case the additional question as to whether time should be extended as he was (in the light of the decision we have made) still two days' late filing his appeal following the mandatory reconsideration decision. If the Secretary of State does not object to that short extension, however, then by virtue of regulation 22(8)(a) of the Tribunal Procedure Rules it will be treated as having been made in time unless the Tribunal directs otherwise. The Tribunal in GD's case will also need to deal with the issue of whether the Secretary of State gave GD the notice of regulation 5 revision application time limits required by regulation 7(3)(a) of the D&A Regulations (which was Ground (3) in his appeal). Judge Wikeley's decision in *Secretary of State for Work and Pensions v TR* [2025] UKUT 1 (AAC) will apply (see [107] above). On the basis that the appeal was remitted for rehearing, GD was content for us not to make any findings on his other grounds, since they would be subsumed in the rehearing, although he did not withdraw his Ground 3 as such.

The Hon. Mrs Justice Heather Williams DBE
Upper Tribunal Judge West
Upper Tribunal Judge Stout

Authorised for issue on 6 October 2025
Typographical errors in paragraph 120 corrected 8 December 2025