

Neutral Citation Number: [2026] UKUT 410 (AAC)

Appeal No. UA-2024-001077-ESA

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Between:

Sharon Forsyth

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Buley KC

Hearing Date: 16 September 2026

Mode of Hearing: CVP

Representation:

Appellant: David Payne

Respondent: Peter Webster

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Judge/Panel: Judge J Verman

Tribunal Case No: SC196/23/00480

Tribunal Venue: Walsall

Decision Date: 25 January 2024

SUMMARY OF DECISION

RECOVERY OF OVERPAYMENTS (27)

This case concerns recovery of an overpayment of Employment and Support Allowance. It raises two issues.

The first, which is of wider significance beyond this case, concerns the correctness of the decision of Commissioner Stockman in *SK v Department for Communities (ESA)* [2020] NI Com 73. In that case Commissioner Stockman distinguished *Hinchy v SSWP* [2005] UKHL 16, [2005] 1 WLR 967, by holding that, where a claimant does not themselves report a material change of circumstances, an overpayment of benefit nevertheless may not be recoverable where it is shown that the relevant DWP department or office has actual knowledge of that change as a result of the DWP's internal computer systems.

The Upper Tribunal holds that *SK* was wrongly decided, and that the effect of *Hinchy* is that a claimant's duty to disclose a change of circumstances in accordance with instructions given by the Secretary of State is incapable of being affected by the state of internal channels of communication within the DWP, even if it is shown that those internal channels of communication led to the relevant information being held within the office to which the claimant was instructed to provide disclosure. Accordingly, the First-tier Tribunal in this case did not err in law by failing to follow *SK*.

The second issue is whether, on the facts of this case, the First-tier Tribunal erred in law by failing to address the consequences of the Appellant's evidence that she had provided disclosure of a material change of circumstances by telephone. On that issue, the Upper Tribunals holds that the First-tier Tribunal did err. Whether or not the Appellant's failure to disclose a separate change of circumstances was causative of the overpayment cannot be resolved by the Upper Tribunal in the abstract, but will need to be addressed in the light of concrete findings of fact about the extent, and the circumstances, of any disclosure which she did make.

In addition, the Upper Tribunal makes some observations about the need for clear and precise findings about what instructions had been given to the Appellant as to whom any disclosure was to be made.

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 judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 25 January 2024 under number SC196/23/00480 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
2. **The new First-tier Tribunal should not involve the tribunal judge previously involved in considering this appeal.**
3. **The Respondent is directed to file a supplemental written submission, together with any further evidence, within one month of the issue of this decision, which specifies the office, address or phone number to which the Appellant was required to report any change of circumstances, and explains the legal basis upon which it is contended that the Appellant was**

so required, including by reference any instructions it is said were given to the Appellant.

4. **If the Appellant has any further written evidence to put before the tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of receipt of the submission referred to in (3) above.**

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

REASONS FOR DECISION

Introduction

1. This case concerns the entitlement of the Secretary of State to recover an overpayment of social security benefit from the Appellant. It raises broadly two issues.

2. The first issue is of some wider application beyond this case, concerning the interpretation of *Hinchy v SSWP* [2005] UKHL 16, [2005] 1 WLR 967, and the decision of Commissioner Stockman in *SK v Department for Communities (ESA)* [2020] NI Com 73.

3. *SK* has been considered, and distinguished (but not followed) in a number of decisions of the Upper Tribunal, in terms which have left open the question of its correctness for a future occasion. The First-tier Tribunal ("FTT") in the present case took the same approach of distinguishing *SK* on its facts. For reasons that I will explain below, I think it would be unsatisfactory to leave that question open to a yet further occasion, and, unlike some of the other cases, I have had the benefit of oral argument on *SK* and *Hinchy.* In any case I do not think that I can deal with the present appeal without confronting the correctness of *SK*. I have concluded that *SK* was wrongly decided, in that, contrary to *SK*, *Hinchy* does not require or permit consideration of whether officials in the Department for Work and Pensions ("the DWP") had "actual knowledge" of the material fact which a claimant has failed to disclose. For this reason I have also concluded that the FTT in this case made no material error of law in, in effect, disregarding *SK*. Accordingly, on this issue, and the grounds of appeal which are related to it, the appeal does not succeed.

4. However, the appeal also raises a second issue, as to whether the FTT erred by failing to deal appropriately with the Appellant's evidence that she had reported some, though not all, material facts relating to her benefit entitlement. On that issue, I have concluded that the FTT did fail to make appropriate findings, and that that error is at least potentially material. Although the Secretary of State invited me to conclude that the failure was not material, I do not think it is appropriate for me to consider that issue in the abstract, without clear findings as to whether the Appellant did in fact disclose relevant matters to the DWP, and the circumstances in which that occurred. I doubt whether the issue of materiality is one of pure law, or one on which only one possible conclusion is possible. In any

case, even if the issue is one of law, it is one that would be better decided in the context of concrete factual findings, rather than in a factual vacuum.

5. Accordingly, I allow the Appellant's appeal to the UT on this second issue. The appeal is remitted to a differently constituted FTT to consider afresh, in light of the rulings in this judgment.

Background

6. The Appellant claimed ESA from 8 September 2014. She is also in receipt of the daily living component of Personal Independence Payment ("PIP"), as a result of which she was paid SDP as part of her ESA.

7. In 2017, two things occurred which affected the Appellant's eligibility for SDP. According to the Secretary of State's submission to the FTT, the Appellant's daughter "was at the same address and Child Benefit ceased for her". This suggests that the daughter may have been living with her already, but that she ceased to be a child. The date given seems to be 3 July 2017, which is also the date from which it is said that CA was paid to the daughter in respect of the provision of care to the Appellant. Other parts of the FTT papers suggest however that the daughter may have moved in with the Appellant at around this time, as well as claiming CA. At any rate, it is common ground that, from 3 July 2017, or thereabouts, the daughter was an adult living with the Appellant and was also claiming CA in respect of caring for her.

8. As a result of this there were two material changes of circumstances affecting the Appellant's entitlement to SDP from 3 July 2017, namely (i) that the Appellant's daughter, as an "adult non-dependent", was living with her, and (ii) that the Appellant's daughter was claiming CA in respect of the care she provided to the Appellant. In accordance with the legislation explained in the next section, each of these provided a separate and freestanding reason why the Appellant ceased to be entitled to SDP from this date. At least so far as I can tell from the papers, both took effect on the same date.

9. Payment of CA to the daughter ceased on 29 June 2020, but from that date a different person successfully claimed CA in respect of the Appellant. It is not clear to me whether the daughter continued to live with the Appellant throughout this period, or, if not, when she ceased to do so. At any rate, from July 2017, to May 2021, the Appellant remained disentitled to SDP, at least by reason of the fact that someone was claiming CA throughout this period, and also because her daughter was living with her for some or all of this period.

10. On 5 May 2021, the DWP became aware of these matters, apparently because "the system was updated", and a decision was made bringing the Appellant's entitlement to SDP to an end from that date. The Appellant does not challenge that decision.

11. In due course an overpayment decision was made, on 19 October 2022, that an overpayment had been made (in the sum of around £13,000, although the precise figure has altered as the case has progressed and I do not need to make a finding as to the precise amount). The reasons were expressed as follows:

> *On 3/7/17, or as soon as practicable after,* [the Appellant] *failed to disclose the material fact that* [the daughter] *was at the same address and Child Benefit had ceased for her and from 3/7/20 Carers Allowance was paid to* [the later carer]

12. It is noteworthy that the material fact which it was said should have been disclosed in 2017 was the fact that the daughter lived with the Appellant, not the fact that the daughter was in receipt of CA, although payment of CA was relied upon in relation to the change of carer in 2020.

13. The Appellant appealed, and a mandatory reconsideration occurred. In this later decision, the matter which was relied upon was "failure to disclose the material fact that someone was in receipt of Carer's Allowance for looking after you", without distinction as to 2017 and 2020.

14. The Appellant has never sought to claim that she did, directly at least, report the fact that anyone was in receipt of CA in respect of her. However, when the matter came before the FTT, she gave evidence that she had reported that her daughter was living with her. That is recorded in the FTT's Statement of Reasons ("SOR") as follows:

> *17. … The appellant gave oral evidence that she told the DWP that her daughter had moved in by telephone. She did not tell them that her daughter was a carer because she thought that it was automatic.*

15. The fact that the Appellant claimed to have told the DWP that her daughter was living with her was not further explored in the SOR, either in terms of whether the FTT accepted this evidence, or what relevance it might have (if true) to the recoverability of any overpayment.

16. The FTT refused the appeal, holding that (i) the Appellant had been instructed of the need to report a change of circumstances at "the ESA Department" (SOR 25), (ii) that the Appellant had failed to report the fact that anyone was claiming CA in respect of her, and (iii) accordingly, the overpayment was recoverable.

17. Permission to appeal was granted by Judge Brunner KC (as she then was), on two bases, *first,* whether the FTT had correctly applied *SK,* and *second*, in relation to the Appellant's oral evidence about having reported that her daughter moved in with her. Judge Brunner observed that the FTT appeared to have accepted that evidence and observed that:

> *The FTT does not appear to have considered the effect of that disclosure on recoverability, which is an arguable error of law.*

Legal Framework

ESA

18. ESA is payable under the Welfare Reform Act 2007. Further provision is made in the Employment and Support Allowance Regulations 2008 ("the 2008 Regs").

19. Para 6(1) of Schedule 4 to the 2008 Regs provides that the condition for receipt of SDP is that a person must be a "severely disabled person". Para 6(2) provides that a claimant is to be treated as a severely disabled person "if, and only if":

> *(a) in the case of a single claimant…*
>
> *(i) the claimant is in receipt of* [various qualifying disability benefits the daily living component of PIP]*;*

(ii) subject to sub-paragraph (4), the claimant has no non-dependants aged 18 or over normally residing with the claimant or with whom the claimant is normally residing; and

(iii) no person is entitled to, and in receipt of, a carer's allowance or carer support payment or has an award of universal credit which includes the carer element in respect of caring for the claimant; …

20. Sub-para (4), referred to in sub-para 6(2)(a)(ii) above, makes an exception where the non-dependent is themselves disabled in certain respects. It is not material to this case.

21. Thus, a claimant is passported to receiving the SDP where the claimant themselves receives a qualifying disability benefit such as PIP, other than where either or both:

    (i) The claimant lives with another adult who is classed as a non-dependent. Presumably, the policy rationale behind this is that the need for the additional SDP payment may be removed or mitigated by the fact that the adult in question may be able, at least informally, to provide some level of care or at least assistance.

    (ii) Someone else is paid CA or an equivalent benefit as a result of the care which they provide to the ESA claimant. Again, the policy rationale is presumably that the fact that care is being provided removes or mitigates the need for additional assistance via SDP.

22. These disqualifying conditions are distinct, and they are given equal prominence in para 6 of Schedule 4, so I see no basis to assume that one is more obvious or easy to appreciate to a decision maker.

Recovery of overpayments

23. Section 71 of the Social Security Administration Act 1992 ("the SSAA") make provision for the Secretary of State to recover overpayments of benefit. The basic condition for recovery is set out in subsection (1):

71(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

24. In *Hinchy,* there was some discussion of whether the duty to notify is implicit in section 71 SSAA, or to be derived from what was then reg 32(1) of the Social Security (Claims and Payments) Regulations 1987 ("the 1987 Regs"). In practice, as discussed below, I think it is necessary to locate the duty in the 1987 Regs.

25. Reg 32 has since been amended. The sub-regulations which are now relevant to changes of circumstances are regs 32(1A) and (1B). Reg 32(1A) provides:

> *(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded.*

26. This does not, in itself, specify what information must be provided, but it permits or empowers the Secretary of State to "determine" (which I think must include notify the claimant) "the information or evidence [he] may require" in connection with any benefit that has been awarded.

27. It may be contrasted with reg 32(1B), which expressly requires claimants to notify "any change of circumstances", but only where the claimant "might reasonably be expected to know" that the change in question might affect their benefit entitlement. This potentially more general duty to notify such changes is therefore subject in each case to whether it would be reasonable for the claimant to realise that this might impact their entitlement. By contrast, where, pursuant to reg 32(1A), the Secretary of State has specified that certain information must be provided, the claimant will be under a duty to provide this information regardless of whether it would be reasonable to them to appreciate its affect on benefit entitlement. The Secretary of State has not sought to rely on reg 32(1B) here.

28. I note that reg 32(1B) expressly requires a claimant to give notification to "the appropriate office", which may be by telephone or in writing, unless the Secretary of State stipulates that it must be in writing. The "appropriate office" is defined in reg 2 as "an office of the [DWP]", other than where a specific postal address has been specified. As I read these provisions, notification under reg 32(1B) may be given by telephone or in writing at any DWP office, unless the Respondent has specified a specific address to which notification must be provided in writing. In my view that underlines the need for the Secretary of State to specify a particular address, or other method of communication, if he wishes to maintain the position that communication to some other part of the DWP is not sufficient.

Hinchy

29. *Hinchy* is the lead case on section 71 SSAA, and in particular on the question of whether a claimant must report changes in the benefits which they are in receipt of, even where they imagine that must already be apparent to the DWP.

30. The facts were that Ms Hinchy was in receipt of income support (IS), and also in receipt of a time limited award of Disability Living Allowance (DLA). Much as in this case, the DLA award entitled Ms Hinchy to an SDP uplift to her IS. When it came to an end, by operation of law on the expiry of the 5 years, entitlement to the SDP uplift also ceased. Ms Hinchy failed to report the cessation of her DLA award to the relevant social security office (or indeed at all), and an overpayment was made for a period of about two years which the Secretary of State then sought to recover under section 71 of the 1992 Act.

31. Reg 32(1) of the 1987 Regs, in the form that it then took, was similar to current reg 32(1A), save that it specifically required notification to be given to "the appropriate office". Ms Hinchy's "order book" included a declaration by her that

she had read the instructions which it contained, which included a requirement to get in touch with "the Social Security Office", at a particular address, if circumstances change, including whether "any benefit goes up or down". There was an issue about whether that instruction included a requirement to tell the relevant office that some other benefit had ceased altogether, rather than merely altered in its amount, which the majority (Lord Scott dissenting) resolved against Ms Hinchy.

32. By the time the case reached the Court of Appeal, it had become apparent that there was a system of internal communication between different parts of the DWP, which, if it had worked correctly, should have alerted the team administering IS that Ms Hinchy's DLA payment was due to cease, so that the IS team could diarise the expiry date and, if all went well, make appropriate changes to the IS award. But, as Lord Hoffmann says at paragraph 15, "in this case it appears that at some point the system failed".

33. The Court of Appeal ([2003] 1 WLR 2018) held that the fact that the DWP should already have been aware of the expiry of DLA, since it was the result of its own decision making, and because of the system of internal communication between different parts of the DWP, relieved Ms Hinchy of any requirement to separately notify the DWP, because the relevant information, per Aldous LJ:

> *… was within the knowledge of the Secretary of State acting through the decision-makings in the* [DLA] *office. … It was reasonable to believe that knowledge would reach the Secretary of State acting through his decision-makers in the relevant Income Support Office.*

34. Carnwath LJ, as he then was, went further, and said that "the Secretary of State cannot disclaim knowledge of his own decisions".

35. This approach was rejected by the House of Lords. The lead speech was given by Lord Hoffmann. Lords Hope and Walker agreed with his speech and the reasons that he gave. Lord Scott dissented, but only on the question of the proper interpretation of the instructions in the order book. Baroness Hale concurred in the result of the majority but gave a speech expressing greater reservations than Lord Hoffmann on the interpretation of the order book.

36. One issue discussed in *Hinchy* was whether the duty to disclose was inherent in section 71 itself or arose only by way of regulation 32 of the 1987 Regs. Lord Hoffmann's speech is somewhat ambivalent on this (see for example paragraph 22), but in what I would regard as the critical paragraph for the purposes of the *ratio* of the judgment (see below), he seems to come down in favour the latter, when he states that the duty corresponds to the instructions in the order book (which is given effect by reg 32). Lord Scott, who did not dissent on this issue, comes down firmly in favour of reg 32 rather than any more general duty (see paragraph 40). Baroness Hale seems to have considered that the source of the duty was reg, 32(1), rather than section 71(1) by itself (see paras 53-4). At any rate, on her approach, specific instructions are required. Whether or not the duty is to comply with specific instructions or to notify change of circumstances did not matter, because:

> *55. … In the first case, it is incumbent upon the Secretary of State to make it crystal clear what it is that he needs to know and in the second case the claimant cannot reasonably be expected to know that something might affect his claim to benefit unless the Secretary of State has made it clear what sort of changes might do so.*
>
> *56. … The claimant cannot be expected to guess who needs to know the information required. It is incumbent upon the Secretary of State to make it plain to whom the information is to be given or the change in circumstances notified.*

37. Thus, on her approach, whatever the legal source of the duty, it does not extend beyond what the claimant has been specifically told is relevant. Likewise, the claimant must be told clearly to whom the information is to be given. That approach seems to me to be further reinforced by reg 32 in its current form. Claimants are now under express duties to notify (a) specific changes which the Secretary of State instructs them to notify, under reg 32(1A), and any other changes which it is in any case reasonable for them to realise will affect their entitlement, under reg 32(1B). That leaves no room for any freestanding requirement to notify changes falling outside one of these two limbs. Baroness Hale's observations also suggest that the scope for reg 32(1B) to operate on matters not falling within reg 32(1A) is, at best, limited.

38. The critical issue in the case was whether the claimant could be relieved of her duty to notify a change of circumstances because it was already known to the Secretary of State, either because he was deemed to know everything known within his department or because of the internal arrangements that had been put in place.

39. All five Law Lords reject the approach of the Court of Appeal to this issue, and conclude that the duty to disclose cannot be discharged in this way.

40. First, as Lord Hoffmann puts it at paragraph 23, "disclosure … must be made to the relevant official and not to the Secretary of State as an abstract entity". Since the obligation is to notify a particular person or office, rather than the Secretary of State / Department seen as a legal entity, there is no scope for the doctrine that the Secretary of State is deemed to have knowledge of all of his decisions.

41. Turning to the argument that a claimant might be relieved on the obligation to disclose by reason of the fact that the relevant information is already known to the DWP generally, or held within it, or by reference to assumptions about what internal channels have been put in place or would be put in place by a reasonable Secretary of State, I think that the key passage, which contains the *ratio* of the judgment, is in paragraph 32. Lord Hoffmann prefaces this paragraph by quoting Carnwath LJ in the Court of Appeal, who had said that "the claimant is not concerned with the internal administrative arrangements of the department". Lord Hoffman continued:

> *32. I quite agree. The claimant is not concerned or entitled to make any assumptions about the internal administrative arrangements of the department. In particular, she is not entitled to assume the existence of infallible channels of communication between one office and another. Her duty is to comply with what the Tribunal called the "simple instruction" in the order book. … For my part, I would approve the principles stated by the Commissioners in R(SB) 15/87 and CG/4494/99. The duty of the claimant is the duty imposed by regulation 32 or implied by section 71 to make disclosure to the person or office identified to the*

> *claimant as the decision maker. The latter is not deemed to know anything which he did not actually know.* [Emphasis added]

42. In my judgment, the *ratio* of this passage is simply that the claimant's duty is to furnish the information in the manner specified in the order book or, as it would now be, in the ESA 40 or equivalent communication issued to the claimant. They are not relieved of that duty by any assumption that they may make about the DWP's internal arrangements. That is so whether or not their assumption is reasonable, and whether or not it is in fact correct.

43. There is perhaps something of a rhetorical flourish in the way that this is expressed at the start of paragraph 32, in so far as Lord Hoffmann was expressing his ostensible agreement with Carnwath LJ whilst turning the consequence of what Carnwath LJ had said to opposite effect. That is why the point is linked to the claimant being "concerned or entitled" with any "assumption" about internal arrangements. However, I do not think that Lord Hoffmann was confining what he said to such assumptions *per se*. The point being made is that the DWP's internal arrangements, and its internal knowledge, is simply irrelevant to the claimant's duty. That duty subsists whether or not the information in question is already held, and whether it is held by the DWP generally, or within the specific office to whom the disclosure is made, or even, in the most extreme case, by the specific official to whom the claimant makes the disclosure.

44. I do not think that this *ratio* depends upon, or would have been different but for, the then state of the internal arrangements in the DWP. That is, Lord Hoffmann was not saying that a benefit claimant is not entitled to assume effective internal channels of communication because no effective arrangements were in place at the material time, or because such arrangements were not practical given the capabilities of the DWP's computers, or computers generally, at that time. Rather, he is saying that whether or not the DWP has internal channels of communication, and whether or not they are effective, is legally irrelevant to the claimant's duty to disclose information specified in the order book. This being so, changes in the internal arrangements, or changes in expectations or the capabilities of modern computing, are incapable of undermining the approach which Lord Hoffmann set out, which depended on his interpretation of section 71 SSAA and reg 32 of the 1987 Regs.

45. In argument before me, Mr Payne contended that *Hinchy* nevertheless leaves untouched, and indeed reaffirms, the principle that disclosure cannot be made to a person who *actually* knows the matter to be disclosed (at least where if the person making the disclosure knows that they know it), and that this principle (which seems to underpin Commissioner Stockman's decision in *SK*) remains available to a claimant who is able to show that someone in the relevant office actually knows the matter that falls to be disclosed. Further, para 32, which I have set out above, expressly approves the "principles" in the decision of three Commissioners in *R (SB) 15/87.* In that case, the Commissioners had said that they agreed with earlier case law, to the effect that:

> *25. … disclosure consists in the statement of a fact so as to reveal that which so far as the disclosure knows was previously unknown to the to the person to whom the statement is made. …*

46. That does not necessarily correspond to the proposition that disclosure to a person who already knows is conceptually or legally impossible. I appreciate that *Foster v Federal Comm of Taxation* (1951) 82 CLR 606, cited by the Commissioners, comes closer to this more general proposition. Lord Hoffmann also refers to this more general principle in para 12, but he does so in terms which leave some doubt as to whether he agreed with it, and which suggest that he did not regard it as relevant. So I am not sure *R (SB) 15/87* is authority, in this context, for a very general rule that disclosure can never be made to a person who already knows the fact in question. I am also unsure, even if it is, that that falls within the "principles" which Lord Hoffmann intended to approve in para 32 of *Hinchy.*

47. However, I do not think it is necessary to resolve this debate, and I proceed on the basis that, as a matter of law, "'disclosure' to a person who already knew or is deemed to know [is] conceptually impossible" (per Lord Hoffmann at para 12), and hence that one cannot be obliged to disclose something to a person who, to one's one knowledge, already knows that thing. Assuming that to be correct, it does not matter.

48. What *Hinchy* establishes is that the claimant must make disclosure to the "relevant official", which in practice means not a particular named individual but the particular office or other internal sub-division within the DWP. But whereas the Secretary of State as an abstract entity is a distinct legal person, no sub-division of his department has any separate legal identity, which can be deemed or treated as knowing anything at all. Further, whilst there is a general constitutional principle, which operates in certain spheres of public law, that the Secretary of State may be deemed to have the knowledge of their officials, who are deemed to act on behalf of the Secretary of State even where the Secretary of State has no personal involvement in a decision, there is no such principle which can be applied at the level of different sub-divisions within the DWP. *Hinchy* decides that that general constitutional principle has no relevance to disclosure under section 71 SSAA. Below the level of the Secretary of State, there is no legal principle that would permit knowledge to be deemed to be known to a sub-division of the DWP, and even if there were, the logic of *Hinchy* is that it would not apply to section 71 SSAA. The applicable "office" or "department" etc does not actually know anything, and it is not deemed to know anything. In my judgment, therefore, there is simply no scope to attribute knowledge to the "office" or other sub-division, and no scope to "deem" knowledge to be possessed by an official or indeed any other person who does not in fact have that actual subjective knowledge.

49. Of course, in theory, a specific individual within the department, or within the relevant office, might "know" the relevant fact, at least if they happened to have consulted the claimant's file recently. But the fact that a particular (natural) person working in the DWP, or even in the relevant office, has such subjective knowledge at a particular point in time (for so long as they retain the information), has no bearing on the claimant's duty to comply with instructions given pursuant to reg 32(1A), quite apart from the fact that (whatever assumptions may be made about the efficacy of internal channels of communication) the claimant would have no way of knowing that any particular person has consulted her file. Their subjective knowledge is not imputed to the Secretary of State, and it is not imputed to the "office" or "official" to whom disclosure has to be made under reg 32(1A).

50. For these reasons, even if I assume that the *Foster* principle is good law for the purposes of section 71 SSAA, in my judgment it does not affect or cut down on the *ratio* of *Hinchy,* which is simply that a claimant is under a duty to comply with any instructions they are given to report a change of circumstances, provided that (a) it is a change of circumstances of a kind which they have been instructed to report and (b) they are told in clear terms to where such disclosure must be made. Provided that such instructions are given, it is irrelevant that the information in question may already be held within the relevant office or even known subjectively by personnel working within that office.

SK v Department for Communities

51. In *SK,* the appellant's main argument, as summarised by Commissioner Stockman at paragraph 6, was that there had been no failure to disclose because:

> *… the Department already knew the material fact in issue – namely that his entitlement to the middle rate care component of DLA was due to end from 7 September 2012 - and that he could not fail to disclose it in these circumstances. He further submitted that the Department's failure to act on the information it possessed broke the chain of causation necessary to establish recoverable overpayment.*

52. Having held an oral hearing, Commissioner Stockman explains that he made a series of directions which led to progressively more detailed factual information being elicited from the Department about (i) the information sharing arrangements which it has in place, and (ii) precisely how those information sharing arrangements were accessed in dealing with the appellant's case. This led to a very full account of the arrangements relevant to the appellant's case being provided to the Commissioner (though not to the FTT which dealt with the case initially). He summarised the effect of this as follows:

> *45. … The evidence in this case about the Department's computer systems was somewhat piecemeal. However, one cannot envisage a rational modern computerised system of administration of benefits, where the rate of one benefit (ESA) is conditional on entitlement to another (DLA), which does not verify the details of that other award. The evidence indicates that, in line with that expectation, the relevant computer system generated notices of DLA decisions to the ESA branch and required action by ESA officials when a DLA decision was received.*
>
> *46. Moreover, there is evidence in this case that the appellant's ESA computer claim was accessed on 20 July 2012, albeit with no evidence of action being taken. I do not consider that it is coincidental that the appellant's DLA decision was issued on 17 July 2012, a few days before the relevant ESA system was accessed on 20 July - an otherwise random date. It seems entirely likely that the reason for access to the computer system on 20 July 2012 was that the ESA staff had received a WAR computer prompt to the effect that the appellant's DLA award was changing. On the balance of probabilities it appears to me that the Departmental staff in ESA were made aware by the computer system of the change in circumstances.*

53. Thus, there was a finding of fact that the relevant information about DLA had notified and alerted to the ESA team, and indeed that ESA staff had specifically

accessed this information at some point but, presumably, failed to act upon it. The implication must be that some specific member of the ESA staff was actually / subjectively aware that the DLA award was coming to an end at some point in or around the relevant date.

54. It was common ground between Mr Payne and Mr Webster, and I accept, that the legal approach which Commissioner Stockman then applied to this set of facts is encapsulated by him in the next paragraph, as follows:

> *… it seems to me that, in order to discharge the obligation to disclose, the issue in these cases is not merely whether the Department knew the fact in issue, but whether the appellant knew that the Department knew it.*

55. In short, notwithstanding *Hinchy,* a claimant will be able to "discharge" the obligation to disclose a relevant piece of information if, without having taken any positive steps to inform the relevant office of that information:

    (i) The information in question is actually known within the office in question (I take "Department" here to mean "relevant office", since otherwise the approach is flatly at odds with *Hinchy,* and because that is how I understood Mr Payne to put his case); and

    (ii) The benefits claimant also knows that they know it.

56. It is perhaps possible to read this paragraph in other ways, but this reflects the way that Mr Payne put it and it seems to me that other readings are even harder to reconcile with *Hinchy*.

57. Applying that approach to modern circumstances, and to the particular facts he had previously found at paragraphs 45-6, the Commissioner then continues as follows:

> *48. There is a vast difference between the manual administrative systems that pertained in the days before computerisation and the technology available to the Department today. Hinchy addressed a disjointed Departmental administration in the period from 1993 to 1998 passing information about DLA awards around on pieces of card, where one branch did not know what the other was doing. The evidence in this case indicates that that system has been consigned to the past. Claimants are entitled to assume that when they receive their decision in relation to one benefit, the Department's modern computerised systems will not just have communicated the decision to them, but also to any other branches of the Departmental administration where that decision has an impact.*
>
> *49. In the present case, I am satisfied that the record of access to the ESA computer system on 20 July 2012 was triggered by exactly such a communication and that the ESA branch of the Department knew of the change in circumstance in relation to the DLA award. I do not need to investigate why, when that was the case, the Departmental staff in ESA took no action. It is enough to establish on the balance of probabilities that the ESA branch of the Department knew the material facts.*
>
> *50. More generally, I am also satisfied that when he received notice from the Department of the change it was making to his DLA award, the appellant was*

> *entitled to assume that all relevant branches of the Department also had received that information. I agree with the reasoning of Chief Commissioner Mullan in PMcL v DfC and support his approach. Lord Hoffman said at paragraph 32 of Hinchy that "the claimant is not entitled to make any assumptions about the internal administrative arrangements of the Department. In particular he is not entitled to assume the existence of infallible channels of communication between one office and another". However, it is plainly time that the factual circumstances underpinning the House of Lords decision in Hinchy are distinguished in order to reflect the reasonably expected standards of 21st century benefits administration.*

58. It is not entirely clear to me what relevance this reasoning has to the satisfaction of the two conditions set out at paragraph 47 (actual knowledge within the relevant office, and claimant's knowledge of that knowledge). One way of reconciling what Commissioner Stockman says in paragraph 48 with *Hinchy,* which I discussed with Mr Payne during his reply, might be that what is said there about claimants being entitled to assume that the Department knows the material fact will provide the basis for a conclusion that the claimant satisfies the second condition: i.e. that the claimant knows that the relevant office / official already knows the relevant information. On that basis, in so far as paragraph 47 can be reconciled with *Hinchy* at all, paragraph 48 might not be incompatible with it, because it is addressing the question of whether the claimant is entitled to say that they knew that the relevant office knew, and this only arises in a subset of cases, where the relevant office did indeed know, with which *Hinchy* is not concerned. That is, on any view, quite convoluted, and it also seems to lead to the conclusion that the claimant will always be able to say that the second condition in paragraph 47 is always met, by reference to the change in computer systems since *Hinchy* was decided. So, on that approach, claimants will always know, or be entitled to assume, that the relevant office knew the information in question, whether or not, as a matter of fact, the relevant office did know.

59. The only alternative reading of paragraph 48 and 50 that I can see is that Commissioner Stockman has straightforwardly sought to distinguish *Hinchy* for all "modern" cases, from whatever cut-off date is thought to be appropriate as representing the date at which "modern computerised systems" have come into their own. He himself says, at the end of paragraph 50, that it is time for this to occur. The premise of this must be that *Hinchy* was based, not on the court's interpretation of the statutory scheme, but simply on the effectiveness or efficiency of the DWP's internal communications or modern expectations about jointed up decision making. For reasons I have already given, I don't think that is the correct reading of *Hinchy*.

60. I therefore have very considerable difficulty with paragraphs 48-50, but this still leaves open the correctness of the approach in paragraph 47. Before turning to that, I should consider the two ways in which it has been suggested that *SK* might be distinguished from *Hinchy* or confined to its very particular facts.

61. The first point, made by Mr Webster, was that the reasoning on all of this might simply be *obiter,* because the true explanation of the outcome of the case is in paragraphs 57-60. In those paragraphs, Commissioner Stockman made a separate finding of fact that the claimant in that case had not been given the

Northern Ireland version of the ESA 40, and so had never been under any obligation to disclose the relevant information about his DLA award. Mr Webster would not have supported the way in which that finding was reached, or the finding at paragraph 60 that the FTT's opposite finding had been legally erroneous, but he is right to say that there is a finding to this effect and that it provides an alternative basis for the appeal to have been allowed on its facts without getting into what I will call the *Hinchy* issue. However, this seems to me to be an unsatisfactory way to deal with *SK,* for a number of reasons:

(i) The vast majority of the reasoning in *SK* is taken up with the *Hinchy* issue. In his final conclusions, Commissioner Stockman says at paragraph 63 that he is allowing the appeal "on the basis that the appellant could not fail to disclose … that his DLA award had changed" because the Department already knew that fact, and does not refer back to the ESA 40 point. The *ratio* of a case is "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted" *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955. I do not think it is plausible to treat paragraphs 57-60 as setting out the true basis of the outcome in *SK,* so as to consign the much more extensive reasoning which precedes it, and then reappears in paragraph 63, as mere *obiter*.

(ii) The fact that a judge might reach two alternative bases for the outcome of the case, does not mean that one of them does not form part of the *ratio,* if the *Kadhim* test is satisfied: see *R (Youngsam) v Parole Board* [2020] QB 387, at paragraph 48.

(iii) This is not, in fact, the approach that has been taken in later cases in the Upper Tribunal when distinguishing *SK* (as to which see below). They have accepted that *SK* does rest on a conclusion about the *Hinchy* issue, albeit they have sought to confine its effect.

(iv) In any case, to deal with *SK* in this way simply leaves the correctness of what Commissioner Stockman says unaddressed, and able to be drawn on as persuasive in other cases. So I think it is necessary to confront its correctness, rather than simply treat it is as *obiter*, and say that it should be dealt with on a future occasion.

62. The other way of dealing with *SK,* which has been deployed by the UT itself on at least two occasions, is to say that it is confined to its very particular facts. That was the approach of Judge West in *MW v SSWP* [2023] UKUT 50 (AAC), and of Judge Hemingway, in *RT v SSWP,* UA-2022-000049-CA. This was essentially on the basis that in *SK* was a case where there was a specific finding of fact that the relevant ESA office had specific knowledge of the material fact which the claimant had otherwise failed to disclose, but that the *Hinchy* approach would continue to apply in other cases.

63. Both of these cases were decided on the papers, and it is understandable that Judges West and Hemingway might hesitate to say that *SK* was wrong if they felt that it was not necessary to do so to deal with the case before them. However, I do not think that I should take this approach now that the issue has arisen yet again. As the arguments made before me show, the approach in *MW* and *SK*

leave open both the correctness and the ambit of the ruling in *SK,* and may continue to cause uncertainty when it is raised before first-tier tribunals.

64. There is a further difficulty in seeking to confine *SK* to its facts in this way. As I have said, the detailed factual findings which Commissioner Stockman made in that case were not on the basis of evidence that was available to the appeal tribunal. They were only possible as the result of extensive directions made by Commissioner Stockman for the Department to explain its internal arrangements, and also to disclose specific facts about how its computer systems were accessed at the material time by the ESA staff, so as to enable a finding to be reached. The relevant information is, of course, solely within the knowledge of the relevant government department, so if it was relevant at all, it was within Commissioner Stockman's inquisitorial function to actively seek this information. The same will be true in every other case. So if it is relevant at all that the ESA staff knew or were alerted to the material information, it would appear to fall within the FTT's inquisitorial function to make similar directions in each and every case that comes before it, or at least in each case where a clamant asserts that they believed that it was not necessary to disclose information of which the DWP should already have been aware. Indeed, it is difficult to see how that would not have been appropriate in *MW* and *RT.* This is essentially how Mr Payne put his case before me: not that the FTT had erred because the relevant official did in fact know, but that the FTT had erred by failing to make directions to enable appropriate factual findings on this issue. If Commissioner Stockman's approach were correct, then it is difficult to see why this would not be a correct approach.

65. I therefore think that the correctness of *SK* must be confronted head on. For reasons which will, by now, largely be apparent, I conclude that *SK* was wrongly decided, and I specifically reject the approach set out in paragraph 47, which permits *Hinchy* to be distinguished in any case where it is shown that the relevant information was held in the particular DWP office or department to which disclosure was required.

66. That is because, as I have explained, in my judgment the *ratio* of *Hinchy* is straightforwardly that a claimant has a duty to disclose any change of circumstances of a kind which they have been instructed to disclose, to the person to whom they have been instructed to disclose it. For these purposes, it is irrelevant that the information in question is already held within the DWP, and irrelevant that it is already known within the relevant office or even subjectively actually known to a particular individual official. Those things, even if true, do not affect the claimant's duty to disclose the matters that they are instructed to disclose.

67. Further, the fact that such information is already known is not generally a basis to say that the failure to disclose had no causal effect. This causation question is always a hypothetical exercise: what would have happened if the relevant disclosure had been made? Though it is of course possible that in any given case a further mistake would be made, and the disclosure would not be acted upon, in any individual case where no disclosure has been made it is more likely than not, applying the balance of probabilities, that the disclosure would be acted on. Logically, the fact that the information is or is not already held within the relevant office, or that some other mistake has already occurred in that particular case, is

irrelevant to the question of whether action would have been taken if a specific disclosure had been given by the claimant.

68. I have taken considerable time to consider *SK* because I am conscious that, as a decision of a Northern Ireland Social Security Commissioner, it is entitled to considerable respect. I would not be bound by it even if it were a decision of another UT judge. It may be that, in light of *R (Jwanczuk) v SSWP* [2026] AC 699, the extent to which I should be slow to depart from a Northern Ireland decision is reduced from what it might be thought to have been under *Deane v SSWP* [2011] 1 WLR 743. *Jwanczuk* may be less important at this level, as opposed to where the relevant level of court means that the case would otherwise be binding (e.g. the E&W and NI Courts of Appeal, which would bind other divisions of their own court). Whatever precise test I should apply, I am satisfied that *SK* should be accorded great respect, but I am equally satisfied that it is clearly wrong. My duty is therefore to not follow it.

What instructions were given to the claimant in this case?

69. On what I take to the *ratio* of *Hinchy,* a claimant is generally only required to make disclosure in accordance with the instructions they are given. In the present case an issue did arise about whether the Secretary of State had specified to the claimant that she must provide information about CA, and if so whether it was specified that that must be to any particular department or office. Although there is no distinct ground of appeal on this issue, I think a proper understanding of what the Appellant had been instructed to do is potentially important to both issues. I will therefore set out what I think is the most secure basis on which the Secretary of State may be entitled to say that he has done that in this case.

70. The FTT found in this case, and Mr Payne did not dispute before me, that the Claimant had been provided with the version of the ESA 40 leaflet that was current in 2014, a copy of which is in the FTT bundle. The first page of this booklet carries the logo for "JobCentre Plus", and then, immediately below it, "Department for Work and Pensions". It seems to be about 25 pages long, and deals with various issues. However, on page 15 there is a heading "Changes you must tell us about", and then:

> *While you are getting Employment and Support Allowance, you must tell us* ***straight away*** *if any of your circumstances change. If you do not tell us straight away then you could be paid too much benefit and have to pay back any money you are overpaid. You may also have to pay a financial penalty or become involved in legal action. If you are not sure if we need to know something,* ***tell us anyway****. If you get in touch with us, tell us your full name and your National Insurance number.* [Emphasis in original]

71. There then follows a series of specific matters which should be notified, such as that the claimant's medical condition has changed, that they are working, and so on. There is then a heading "other changes", followed by a long section on various miscellaneous changes.

72. Within this section, one of the things that is specified is if you "start living with someone, have someone come to live in your house, or someone living in your house leaves".

73. This section concludes with:

> *Also tell us if*
>
> - *you stop caring for someone, or anyone caring for you is awarded Carer's Allowance.*

74. So there is no doubt that this version of the ESA 40 instructs ESA claimants to notify, as a change of circumstances, both the fact that someone else has come to live with them, and also that they have a carer who is awarded CA.

75. The ESA Booklet does not, explicitly at least, specify how or to who the relevant notification must be given. Mr Payne accepted that it set out a requirement to notify the above changes, but argued it did not specify that such notification must be given to JobCentre Plus, still less to the claimant's local office.

76. Mr Webster countered this, in terms of the ESA 40 itself, by pointing to the fact the booklet contains on its front the name / logo for JobCentre Plus (although it makes no refence to any specific local office, and it is a generic document). On this basis, he contended that the requirement to tell "us" must be understood as an instruction to tell JobCentre Plus rather than the DWP generally.

77. Considering the ESA 40 by itself, I would not accept this. The front page of the document refers to both JobCentre Plus and the DWP (of which JobCentre Plus is of course a part). It is not obvious that one is prioritised above the other, and I would imagine (at any rate without evidence to the contrary) that they would be seen as interchangeable for many people. At least at the time of *Hinchy,* JobCentre Plus seems to have dealt with both IS and DLA (broadly, the analogues for ESA and AA): see paragraph 41 of *Hinchy* in the Court of Appeal), so it is far from clear that JobCentre Plus is to be equated with the specific DWP office which administered the Appellant's ESA. There is no reference at all to any specific "office". There is no other instruction about how or to whom changes of circumstances are to be notified, and nothing to suggest, certainly in reasonably clear terms, that the communication must be made to, and only made to, Job Centre Plus. Some phone numbers are provided for other specific matters such as claiming other kinds of benefits or requesting alternative communication formats for disabled claimants. Bearing in mind the legal consequences of failing to disclose information, I do not think that this can be understood as containing an instruction that disclosure must be made to any specific office or department within the DWP.

78. Mr Webster sought to bolster his argument that the reference to "us" must be understood as a reference to JobCentre Plus rather than the DWP generally, by pointing out that the matters that must be notified include, in some cases, information about other benefits that the DWP itself administers. So, as I understand the argument, he says that a claimant would appreciate the inherent improbability of being required to tell the DWP generally about information which, taken collectively, the DWP already knows. This is an ingenious inversion of the argument which his client has resisted in other cases, such as *Hinchy* and *SK,* where claimants have argued that they should not be expected to notify the DWP of matters that the DWP, collectively, already knows. In a different context, such as the interpretation of an ambiguous statute, it might carry some weight, as the

kind of contextual aid to interpretation to which lawyers naturally turn where a legislative provision is ambiguous. I doubt whether it is a point which would occur to a benefits claimant when considering how they should understand the instructions in the ESA 40. In any case I do not think that the instructions in the ESA 40 are capable of containing a sufficiently clear instruction to notify a specific DWP office or department, even if I take on board the point that claimants will appreciate the oddity of being instructed to report to the DWP generally matters of which the DWP as a whole is already aware. Standing back from the detail, whilst the ESA 40 undoubtedly contains a clear instruction to notify a change in CA, it does not contain any clear instruction that such notification must be given to any specific office, phone number, or department, within the DWP, so as to impose a legal requirement on benefit claimants to use this method and no other.

79. However, the ESA 40 does not stand alone. The FTT Bundle contains what I understand to be a standard form of the letter that was, at the material time, sent to claimants on first claiming ESA. The FTT found that the claimant had received such a letter, and Mr Payne did not seek to dispute that at least before me. The letter in question states that (in order to process the claim) the Secretary of State requires "more information before we can deal with your claim". At the end, it records "your declaration statement", that:

> *You have agreed to the following declaration regarding your claim:*
>
> *…*
>
> - *If your circumstances change you must promptly inform the office that pays your benefit, because this may affect your entitlement to benefit or the amount you receive …*

80. This does clearly communicate that the claimant must notify changes of circumstances. Mr Payne accepted that, but did not accept that this statement does, in itself, sufficiently make clear what would constitute a change of circumstances. In so far as I have to consider this declaration alone, I would agree with him.

81. Whilst I can see the logical force of Mr Webster's argument that this requires a claimant to inform the relevant office of any objectively material change of circumstances, I doubt whether that is how it would be understood by a claimant who was asked to sign such a declaration.

82. Furthermore, such an approach sits very unhappily with reg 32(1A) and (1B) taken together, and with *Hinchy*. The scheme which they create is that the general obligation to report any change of circumstances in reg 32(1B) is subject to a requirement that the claimant might reasonably be expected to know that the change in question is material to their benefits claim, but that protection is removed where the Secretary of State has specified (under reg 32(1A)) that specific information must be provided. It is then surely problematic to permit the protection that is given by reg 32(1B) as removed by the simple device of specifying, under reg 32(1A), that the claimant must report any and all changes of circumstances, without making clear what kinds of changes may be relevant. It seems to me that, to satisfy reg 32(1A), it is necessary for the Secretary of State to specific the information he requires with more particularity than simply "any objectively material change of circumstances".

83. What the declaration does do is specify, at least more than the ESA 40, to who any change of circumstances must be notified. In principle, I think it is legitimate to take the two documents together. The declaration makes clear to the claimant that she must notify the relevant office "if your circumstances change", and the ESA 40 sets out the specific kinds of circumstance which must be notified. It is certainly not ideal that the claimant has to piece things together from these two documents, but that does not mean that they do not satisfy a "requirement" within the meaning of reg 32(1A) of the 1987 Regs.

84. I was initially inclined to think that the instruction to notify "the office that pays your benefit" was a sufficiently clear indication of to who the notification had to be given. It is similar to what was said in *Hinchy*. On reflection I am less sure however. In *Hinchy,* a specific address had been specified (see the instructions quoted at para 7 of the Lord Hoffmann's opinion), so it was a specific office that had been specified rather than just an administrative division of the DWP. In his submissions to me, Mr Webster's case seemed to be that the notification had to be made to JobCentre Plus (and, as I have said, he argued that was the effect of the ESA 40), but not (as I understood it) at a particular address or telephone number, and none is given on the ESA 40 that he relied on. At the time of *Hinchy* JobCentre Plus seems to have been an executive agency within the DWP, but that seems to be no longer the case, and no address or telephone number is specified anywhere in the papers before me. An instruction to notify "the office that pays your benefit" is not obviously to be equated with "JobCentre Plus" – I had initially understood to suggest a particular local office. It may be possible to read the requirement to notify "the office that pays your benefit" as to be equated with the address given on the first page of the letter at FTT Bundle page B4, but that is a sample letter rather than the specific letter provided to the Appellant, so it would not necessarily be the right address for her, and it may or may not have been current at the relevant time. The FTT, at SOR 25, talks about "the ESA department", but it is not clear to me that that is the same as either "the office which pays your benefit", referred to in the declaration, or JobCentre Plus. The very fact that there are different formulations, by the Respondent, and by the FTT, of exactly who the Appellant had to notify, and whether that had to be at a particular address or telephone number, leaves me in some doubt about what the Appellant was required to do. If I have not found it obvious, then I would likewise be in some doubt as to whether this had been adequately communicated to the Appellant so as to create a legal obligation under reg 32(1A).

85. I emphasise that I am not deciding these points against the Respondent at this stage, but I think that, if the Secretary of State wishes to rely upon an obligation to provide disclosure to a particular person or office, then he needs to specify with some clarity where that is, and how that obligation arises from the communications that have been made to the Appellant. If the relevant communication is the declaration, to notify "the office that pays your benefit", (a) what exactly is that office, (b) how is that made clear to the claimant, and (c) what would or would not constitute compliance? If the relevant office is JobCentre Plus, or "the ESA department", how was it made clear to the Appellant that this, and only this, would suffice, and how was she to carry out that obligation or even know that she was speaking to the ESA department as opposed to some other part of the DWP?

86. In relation to the Appellant's failure to notify the fact that her daughter was in receipt of CA, this may not matter, because the Claimant does not purport to have notified anyone of this fact, and the ESA 40 does undoubtedly require her to notify someone in the DWP. But in relation to her evidence that she did notify someone in the DWP that her daughter was living with her, this point may be more important. One of Mr Webster's point about why the FTT's failure to deal with that issue was not material, at least in his Skeleton, was that the Appellant's evidence did not specify who she had spoken to, and therefore did not, taken at its highest, satisfy the requirement to notify JobCentre Plus. Indeed, his skeleton, unlike his oral submissions, refers at paragraph 45 to "the ESA unit within the DWP", which only increases my concern over the lack of clarity as to who, exactly, the Appellant had to notify.

87. In circumstances where I have decided that this case should be remitted to a differently constituted FTT, for factual findings on whether the Appellant did in fact notify anyone that her daughter was living with her in 2017, I do not think it is necessary for me to resolve this issue here. As I say below, the new FTT will need to make careful findings, not only on whether the Appellant did in fact speak to someone in the DWP, but who she spoke to, and the extent to which that does or does not comply with any instructions given to her. For that purpose, the FTT is likely to be assisted by a clear explanation from the Respondent as to what his case is on this point i.e. to who, exactly, or where, was the Claimant required to give notification, and (if applicable) by what means?

88. I would add that, more generally, it seems to me to be highly regrettable that it is necessary to resort to two separate documents to understand what a claimant is required to do. That is all the more so given what I regard as the lack of clarity about the appropriate place which has to be notified, and also because, in this case, as in many others, the DWP routinely places reliance on a range of documents as setting out the relevant requirements, not all of which impose any requirement directly on the ESA claimant, and none of which clearly require notification to be given specifically to the office that pays benefits. The cases suggest that claimants do sometimes misunderstand their reporting requirements, for all sorts of reasons.

89. For example, in this case, the FTT itself seems to have placed some reliance on a later version of the ESA 40, from 2018. In fact, though this later ESA 40 does instruct the claimant to tell Jobcentre Plus if anything changes, and does specifically refer to "changes to who lives in your house" in that context, it does not refer to CA as a relevant change. It refers to changes to "the amount of money coming into your house", which might apply if the CA claimant is also living with the ESA claimant, but they may not be, or the grant of CA might not lead to a net change to household income. This seems to me to further highlight that the varied ways in which claimants are instructed to notify changes are far from clear in their overall effect. The lack of consistency is regrettable. It would surely not be difficult for the ESA 40, or any equivalent document, to specify clearly not only the matters which must be communicated, but any relevant stipulation about how that is to be done, including an address and telephone number, in a single place.

The *Hinchy / SK* Ground of Appeal

90. The first ground of appeal on which permission was granted by Judge Brunner was whether the FTT had correctly applied *Hinchy* and *SK.*

91. As I have said, Mr Payne did not seek to argue that the FTT should have followed *SK* by simply saying that the change in conditions meant that *Hinchy* should now be distinguished. His more nuanced argument was that, applying the approach in paragraph 47 of *SK,* the FTT in the present case had erred in law in the way that it had sought to confine *SK* to cases where there was clear evidence that the relevant officials "actually" knew the material fact that the Appellant should have otherwise disclosed. So, he submits, the FTT, applying its inquisitorial jurisdiction, should have given directions (as was done in *SK*) requiring disclosure of whether the relevant officials in the Appellant's case did actually have this information, because only the DWP would be in a position to check the relevant records, which are within his control.

92. If I thought that *SK* was rightly decided, even on a relatively narrow view of its ambit as set out in *MW* and *RT,* I might well have accepted this argument. However, for the reasons I have given, I think *SK* is wrong, and that the extent of the knowledge or appreciation within any part of the DWP of the fact that the Appellant's daughter had been awarded CA is irrelevant to her duty to disclose that information, and irrelevant to recoverability under section 71 SSAA. Accordingly, the FTT made no material error of law in this respect.

93. As a fallback, Mr Payne invited me to consider whether, as it is put in his Skeleton Argument "the principles endorsed … in *Hinchy…* no longer reflect the systems through which the DWP operate and should be reconsidered". As elaborated orally, he invited me variously to consider granting permission to appeal to the Court of Appeal, to consider whether this was a case where a leapfrog appeal to the Supreme Court might be appropriate, and to make any observations I saw fit as to the correctness or appropriateness of *Hinchy* in modern circumstances.

94. As I have explained, I do not think that the principles in *Hinchy* depend or reflect the particular factual position as to the efficacy of internal communication systems that were extant when it was decided, and I do not think that they are capable of being affected by the way those systems have subsequently developed. They depend upon the court's interpretation of the relevant statutory provisions, which have not materially changed. I see no reason to think that they might be reconsidered now, some 20 years on, and (in so far as it is appropriate for me to say so at all) no reason to think that they should be. As to permission to appeal, which I will consider if any application is made to me in accordance with the rules, the Court of Appeal will likewise be bound by *Hinchy*, although that is separate from the question of whether I have properly interpreted *Hinchy* and *SK*.

Did the FTT err by failing to consider the implications of the Appellant having reported her daughter's co-residence?

95. As set out above, Judge Brunner also gave permission on the point that the FTT may have made an error of law by failing to make explore the Appellant's evidence that she had reported the material fact that her daughter was living with her.

96. In his Skeleton Argument, Mr Payne elaborated this argument in three distinct ways. The first, which I consider to be correct, essentially adopts the approach identified by Judge Brunner herself. I will deal with that first before addressing the other two points more briefly.

97. First, Judge Brunner observed that the FTT "appears" to have accepted the Appellant's evidence. I think that probably goes too far. The FTT made no finding rejecting it, and gave no reasons for doing so, but I don't think they can be said to have positively accepted it. However, I don't think this really matters. It is just as much an error of law to fail to made a finding of fact on a potentially material piece of evidence, as it would be to accept it but then fail to consider its impact on recoverability. The FTT which considers this case on remittal will need to consider both questions.

98. Secondly, the evidence which the Appellant had given was obviously material, at least in the sense that the case was about whether the Appellant had disclosed two material facts, and the Appellant had given direct evidence on one of those issues which the FTT said nothing further about. Even if, as I discuss below, the Appellant's failure to report her daughter's receipt of CA is a sufficient basis for the overpayment to be recoverable, so that her having reported the co-residence ultimately does not affect the outcome, I do not think that this point is so obvious that it was acceptable for the FTT to simply ignore the Appellant's evidence or fail to consider its implications. In my judgment, therefore, the FTT's failure to address the implications of this evidence was a material error of law.

99. Thirdly, Mr Webster argued that, taken at its highest, the Appellant's evidence in this regard was not capable of satisfying the Appellant's duty of disclosure, because she did not give evidence about who she spoke to, so she had not discharged the burden of showing that she gave disclosure to the right office or department. She simply said that she spoke to someone in the DWP. I would reject this argument for two reasons:
    (i) The FTT is an inquisitorial tribunal. As I have explained above, the Secretary of State's original decision was based on her failure to disclose the fact that the daughter lived with her. Faced with direct evidence on that point, and whether or not it would have been determinative in her favour, I think it was incumbent on the FTT to address that evidence, including, if necessary, by asking questions about it to see how far it went. The inquisitorial nature of the proceedings means that it should "rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof": *Kerr v DSD* [2004] UKHL 23, [2004] 1 WLR 1372, paragraph 63).
    (ii) In any case it is not clear to me, for reasons I have explained above, exactly to who the Appellant was required to make disclosure, and what would, on the Secretary of State's own case, be the right address or department to contact. At the moment, I am not satisfied that a sufficiently clear instruction on this issue was in fact given to her. In that case, it might be sufficient that she had spoken to someone in the DWP, whether or not they were in "the ESA department". That is a matter that will need to be explored by the FTT on remittal.

100. Fourthly, however, that leaves the difficult further question of whether the Appellant's failure to disclose the fact that her daughter (and, later, another carer) was in receipt of CA, would mean that the overpayment would be recoverable in any event.

101. This issue has to be addressed on the footing that the Appellant did disclose the fact that her daughter was living with her, but did not disclose that her daughter was paid CA. It seems likely that, in that case, it will be concluded that she did fail to report a material change of circumstances, but the question will then be whether that failure was causative of the overpayment.

102. As explained in *BD v SSWP* [2016] UKUT 0162 (AAC), the causation test under section 71 SSAA has two limbs, that that overpayment must have been "in consequence of" the failure to disclose and that it would not have been made "but for" that that failure. In post-hearing written submissions I was also provided with *R(SB) 13/89 / Duggan v Chief Adjudication Officer* and *Riches v SoS Social Security* 1994 SC 26.

103. I accept that these two latter cases give some support for the Respondent's argument that a strict application of the causation test would lead to the result that the Appellant's failure to disclose payment of CA to her daughter would remain causative of any overpayment, regardless of the fact that she had disclosed another material matter which should have led the Respondent to terminate her SDP. However, none of these cases are concerned with the factual scenario that potentially arises here, where a claimant has personally disclosed a material matter which, if acted upon, should have led the Respondent to take action. That is a potentially different situation, which I think is best addressed in light of concrete findings about matters such as (without being exhaustive) (a) to whom the claimant was required to make disclosure, (b) what she did disclose to such persons, and why that information was not acted upon. There is at least arguably a difference between a situation (such as arose in *BD*) where the DWP fails to act on its own internal notifications, and one where it has failed to act in accordance with a valid disclosure by the claimant herself. That difference seems to me to be arguably relevant both to the "but for" test (on the balance of probabilities, would the overpayment still have occurred if the claimant had notified the DWP of the CA payment, perhaps at the same time as she notified them of the daughter living with her?) and the broader question posed by Judge Turnbull in paragraph 37 of *BD* of whether, even if the but for test is satisfied, "it is nevertheless right, as a matter of common sense, to regard the cause of the overpayment as being only some cause (e.g. the Department's own carelessness) other than the claimant's … non-disclosure".

104. I also consider that it is at least possible that the causation issue may be affected by the question of who, exactly, the Appellant was required to report to. If the Secretary of State has, on further analysis, failed to issue clear instructions requiring the Appellant to report to a particular department or official, so that her duty could be discharged by speaking to anyone in the DWP, it is possible that that will have some bearing on the likelihood that reporting in accordance with that duty would have prevented the overpayment from being made.

105. All of this leads me to conclude that it would not be appropriate for me to seek to address the causation issue on an abstract or hypothetical basis, in the absence of clear findings both on what exactly the Appellant did, and what, precisely, she was required to do.

106. For these reasons, I consider that the matter identified by Judge Brunner as arguable when granting permission does indeed constitute a material error of law, and I allow the appeal on that basis. It follows that the case will have to be remitted to a differently constituted FTT in accordance with my decision. In my view the FTT will need to consider carefully (a) whether, and in what circumstances, the Appellant reported the fact of her daughter's co-residence to someone in the DWP, (b) who she spoke to, (c) whether that accorded with any instructions she had been given about the person or office to whom disclosure had to be made and, (d) in light of that, whether her failure to (separately, or at the same time) report the fact that her daughter was in receipt of CA was causative of any overpayment. It may also be necessary to consider whether anything changed when the payment of CA moved to a different carer in 2020.

107. Mr Payne had two alternative arguments. I have some doubts about whether they fall within the grant of permission by Judge Brunner, and in particular I doubt whether the second point does so, but I will address them on the assumption that he has any necessary permission to pursue them. Taking them in turn:
    (i) Mr Payne argued that, by disclosing her daughter's co-residence, the Appellant had implicitly also disclosed that her daughter was in receipt of CA. At least put in that abstract way, I do not accept that. They are identified as different matters under para 6(2)(a) of Schedule 4 to the 2008 Regs, and they are also factually distinct matters. In so far as it is to be said that there was something in the detail of how the Appellant reported her daughter's co-residence when she spoke to the DWP, that is a matter which the FTT may have to explore on remittal, but I don't accept that the mere fact of reporting the one event necessarily implies the other.
    (ii) Mr Payne also argued that the Appellant had in fact disclosed the payment of CA to her daughter by signing a declaration as part of her daughter's CA claim form, including a statement that she had understood that this might affect her entitlement to SDP. The difficulty with this argument is that, at the time that she made this declaration, CA had not yet been granted, so the material change of circumstances had not yet occurred and could not be reported.

108. I therefore reject Mr Payne's alternative arguments under this general head.

Conclusion

109. I therefore conclude that the FTT made a material error of law, by failing to consider or make any findings upon the Appellant's evidence that she had reported her daughter's co-residence to the DWP. The FTT made no material error in failing to consider whether the DWP's internal computer systems meant that someone in the relevant department already had actual knowledge of the daughter's receipt of CA.

110. The FTT will need to consider the points identified at paragraph 106 above. I would also invite the attention of the parties to the directions made at the outset of this decision concerning the filing of evidence.

111. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Tim Buley KC

Judge of the Upper Tribunal

Authorised by the Judge for issue on 21 October 2026