DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision of the Huddersfield First-tier Tribunal dated 12 July 2018 under file references SC246/15/00276 and SC246/16/00109 does not involve any error of law. The decision of the First-tier Tribunal stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A summary of the case before the First-tier Tribunal

1. The case before the First-tier Tribunal concerned the Appellant's appeal against two decisions by the Secretary of State about his entitlement to, and liability for an overpayment of, state pension credit (SPC). In summary, the Secretary of State's decision-maker had decided that the Appellant was not entitled to as much SPC as previously awarded, on account of holding undisclosed capital, and was liable to repay the consequential overpayment.

2. SPC legislation provides that capital below £10,000 is ignored, but above that level a claimant is treated as having a 'deemed income' of £1 for every £500 (or part of £500) by which the person's capital exceeds £10,000 (State Pension Credit Act 2002, section 15(2) and State Pension Credit Regulations 2002 (SI 2002/1792), regulation 15(6)). Until 2 November 2009, the capital threshold was £6,000 rather than £10,000. There is no upper capital limit as such (although at some point a person's deemed income from capital will increase to such a level that SPC entitlement on income-based grounds will be extinguished).

3. Unfortunately, the case has dragged on over several years as it has become bogged down in procedural complexity and confusion. I recognise that the Appellant, a pensioner in poor health acting for himself, has not found it at all easy to deal with this appeal. I am not persuaded by his own grounds of appeal, for the reasons below and which I summarise at paragraphs 31-35 of this decision. However, the Upper Tribunal also has an inquisitorial function, which means that I have considered carefully whether there are any other points that he does not mention in his own grounds of appeal but which might help his case. I have not found any such other grounds, so it follows I must dismiss this appeal.

The First-tier Tribunal's decision now under appeal to the Upper Tribunal

4. The First-tier Tribunal (from now on, and for reasons that will become apparent, "the second Tribunal"), following the hearing on 12 July 2018, dismissed the Appellant's appeals. In its decision notice, issued on the day of the hearing, the second Tribunal confirmed the decision by the Secretary of State on the Appellant's entitlement to SPC for the period from March 2008 to September 2013 (this was the entitlement appeal, SC246/16/00109, now CPC/533/2019). The second Tribunal also confirmed the Secretary of State's decision on the Appellant's liability to repay the SPC overpayment (the overpayment appeal was under reference SC246/15/00276, now CPC/532/2019).

5. The key passage in the second Tribunal's decision notice reads as follows:

> "There has been an overpayment of State Pension Credit amounting to £30,933.73 in respect of the period from 03/03/2008 to 01/09/2013. This amount is recoverable from [the Appellant]. This is because [the Appellant] failed to disclose timeously the material fact that he possessed capital amounting to £11,560.83 in the form of savings from 28/02/2008, which continued to increase".

6. As the Appellant did not attend the hearing, the second Tribunal's decision notice was issued by post to him on 12 July 2018. Under the procedural rules he then had one month in which to request a statement of reasons for the second Tribunal's decision. Just over three months later, the Appellant wrote to the Tribunal office explaining his dissatisfaction with the second Tribunal's decision (letter received 26 October 2018). On 21 November 2018 the First-tier Tribunal refused to extend time for the request for a statement of reasons.

7. Following further correspondence from the Appellant, the First-tier Tribunal, in a ruling dated 21 December 2018, gave the Appellant permission to appeal to the Upper Tribunal. The District Tribunal Judge did not give a reason for giving permission to appeal beyond the statement of the obvious that "it is apparent that [the Appellant] is still aggrieved by these appeals". The reason for that sense of grievance is understandable when one considers the full history of the case, which I explore in more detail below.

The Upper Tribunal's analysis: the First-tier Tribunal's decision under appeal

8. As a matter of strict law, the only decision now before me on appeal is the second Tribunal's decision of 12 July 2018. That is the Tribunal decision in respect of which permission to appeal has been given. However, the fundamental (and in my assessment insurmountable) problem facing the Appellant is that he did not ask the second Tribunal in good time for a statement of reasons for its decision.

9. I have considered whether the District Tribunal Judge's ruling of 21 November 2018, refusing to extend time for the request for a statement of reasons, is open to challenge. In my judgment it is not. The District Tribunal Judge plainly considered in that ruling the lengthy history of these proceedings with some care. The decision to refuse to grant an extension of time, while robust, was certainly not irrational. It was plainly a decision that was reasonably open to the District Tribunal Judge on the available evidence.

10. That being so, the question is whether I can detect any error of law in the second Tribunal's handling of the appeal. The short answer is I cannot. The reason is the Appellant is in a near impossible position because of his failure to ask for a statement of reasons in time. If he had done so, it might (and I put it no higher than that) have been possible to detect an error law in the second Tribunal's decision. But otherwise it is generally difficult, albeit not impossible, for an appeal to the Upper Tribunal to succeed where the Appellant has failed to obtain a statement of reasons from the First-tier Tribunal (see reported Social Security Commissioner's decision *R(IS) 11/99* and *TF v Secretary of State for Work and Pensions (ESA)* [2018] UKUT 265 (AAC)).

11. In the absence of any statement of reasons for the second Tribunal's decision, and in the absence of any reason to consider that the second Tribunal erred in law in any way, I must dismiss this appeal. But that is not the end of the matter.

The bigger picture: did the second Tribunal have jurisdiction to hear the appeal?

Introduction

12. The real nub of this case, and the Appellant's main grievance, is that an earlier First-tier Tribunal (from now on, and obviously, "the first Tribunal") made a decision which, on one reading at least, stated that the amount of the recoverable overpayment was substantially less than the amount originally claimed back by the Secretary of State's decision-maker. However, the first Tribunal's decision was subsequently set aside and the second Tribunal convened instead to re-decide the appeals. The Appellant, in short, argues that the first Tribunal's decision should have stood and that its finding of a substantially lower overpayment should also have stood. For the reasons explained below, I reject that argument.

The chronology

13. This case has taken many twists and turns. The chronology that follows highlights only the most important events on this long and winding road. It starts with the original decisions by the Secretary of State and the decision-maker's suggested revisions to those decisions, as set out in the DWP's response to the First-tier Tribunal at the front of the appeal bundle:

6 May 2015:	Secretary of State's entitlement decision: the award of SPC to the Appellant is superseded as he had capital amounting to £23,622.64 as from 25 February 2008.
6 May 2015:	Secretary of State's overpayment decision: as a result of the entitlement decision, the Appellant had been overpaid £31,856.83 in SPC. As the Appellant had failed to disclose he had capital amounting to £23,622.64, that overpayment of £31,856.83 was recoverable from him.
23 December 2015:	Secretary of State's response to the Appellant's appeal, as submitted to the First-tier Tribunal, proposed a corrected decision to be substituted for the entitlement decision: the award of SPC to the Appellant is to be superseded as he had capital amounting to £11,560.83 as from 3 March 2008.
23 December 2015:	Secretary of State's response to the Appellant's appeal, as submitted to the First-tier Tribunal, proposed a corrected decision to be substituted for the overpayment decision: as a result of the entitlement decision, the Appellant had been overpaid £30,933.73 in SPC. As the Appellant had failed to disclose he had capital amounting to £11,560.83, that overpayment of £30,933.73 was recoverable from him.

14. I interpose here that the amount of the undisclosed capital was therefore said to be £23,622.64 in the original decision and £11,560.83 in the suggested substituted decision, while the total recoverable overpayment was said to be £31,856.83 in the former decision and £30,933.73 in the latter suggested decision. In other words, the Secretary of State's position was that a dramatic drop in the amount of undisclosed capital had only a marginal impact on the total recoverable overpayment.

15. The chronology of the appeal then continues as follows:

15 August 2016:	The first Tribunal heard the Appellant's appeal, issuing two decision notices. The entitlement appeal decision notice stated

that the Appellant had continued to have undisclosed capital "in excess of £10,000" from 3 March 2008 to 1 September 2013. The overpayment appeal decision notice recorded that the amount of the recoverable overpayment had originally been £31,856.83 but had been revised to £30,933.73.

23 September 2016: The first Tribunal issued a single combined statement of reasons for its decision on 15 August 2016. This referred in at least three places to a recoverable overpayment of SPC in the sum of £11,560.83 (paragraphs 1, 26 and 32). There was no mention in the statement of reasons of the DWP's figures of £31,856.83 and £30,933.73.

14 November 2017: The Appellant's MP wrote to the First-tier Tribunal in the following terms:

> *Dear Sir / Madam*
>
> *I am writing on behalf of [the Appellant] … [who] believed from the tribunal that his repayment had been reduced to £11,560.83. Upon speaking to the Department for Work and Pensions, however, they insist that the figure is instead £30,933.73 and that the figure in the tribunal decision is in fact an error … Would it be possible to see what the figure actually is and whether or not the DWP is correct?"*

23 April 2018: A District Tribunal Judge (DTJ) set aside the first Tribunal's decisions (on what were technically two appeals) "as they involve the making of an error of law in the Decision Notice and Statement of Reasons cannot be reconciled".

9 June 2018: A different DTJ issued directions confirming that the first Tribunal's decision had been set aside and the appeal needed to be reheard.

12 July 2018: The second Tribunal rehears the appeals with the outcome as set out above (see paragraphs 4-5).

16. In the rest of this decision I refer to the first Tribunal's entitlement appeal decision notice as "FTT1-entitlement-DN" and its overpayment appeal decision notice as "FTT1-overpayment-DN", while its statement of reasons is "FTT1-statement of reasons". The letter of 14 November 2017 is referred to as "the MP's letter" and the DTJ's ruling of 23 April 2018 as "the FTT set aside decision".

17. The following two principal questions arise out of this chronology. First, what did the first Tribunal decide? Second, was the FTT's set aside decision correctly made?

What did the first Tribunal actually decide?

18. It is plain from reading both the FTT1-entitlement-DN and the FTT1-overpayment-DN that the first Tribunal intended to adopt the decision-maker's suggested revised entitlement and overpayment decisions, as set out in the DWP's response to the appeal. This is shown by the FTT1-entitlement-DN, which refers to the amended overpayment period of 3 March 2008 to 1 September 2013 (rather than starting on 25 February 2008) and the FTT1-overpayment-DN, which refers to the

revised recoverable overpayment of £30,933.73 (rather than the original figure of £31,856.83).

19. The waters were then well and truly muddied by the FTT1-statement of reasons, which, as noted above, referred in three separate places to the recoverable overpayment being in the significantly lower sum of £11,560.83 (and made no mention of the figure having ever been either £30,933.73 or £31,856.83). The Appellant might be forgiven for thinking that the first Tribunal had on reflection changed its mind and come up with the lower overpayment figure, which would obviously be in his interests.

20. However, it is axiomatic that a First-tier Tribunal's decision notice and statement of reasons must be read together and must be internally consistent. Thus, in unreported decision *CCR/3396/2000*, Mr Commissioner (now Upper Tribunal Judge) Jacobs held that "a contradiction between the decision notice and the statement of reasons" would be an error of law (at paragraph 14). Similarly, in *CIS/2345/2001* Mr Commissioner Turnbull ruled as follows (at paragraph 17(2)):

> "a conflict between the reasons given in the Decision Notice and those given in the full statement is likely of itself to amount to an error of law in that, when the two documents are taken together, the Tribunal will not have made its actual reasoning sufficiently clear".

21. See more recently to similar effect *SSWP v C O'N (ESA)* [2018] UKUT 80 (AAC) and *JC v SSWP (PIP)* [2019] UKUT 181 (AAC). Thus, one cannot simply go by whatever the First-tier Tribunal last said on the matter.

22. Reading the first Tribunal's decision notice and statement of reasons together, its decision was, in a word, incoherent. Realistically there were only two possibilities. The first was that the repeated statements in the FTT1-statement of reasons that the amount of the overpayment was £11,560.83 represented simply a typographical or transcription error for £30,933.73, being the figure cited on the FTT1-overpayment-DN on the day of the hearing. The second possibility was that the first Tribunal had completely misunderstood the basis for the DWP decision-maker's suggested revised decision, as set out in the response at the front of the appeal bundle. Either way the first Tribunal's decision was fundamentally flawed and could no longer stand. That takes us to the question of whether the first Tribunal's decision was properly set aside.

Was the FTT's set aside decision correctly made?

23. The substance of the FTT's set aside decision was contained in just one paragraph in the District Tribunal Judge's ruling of 23 April 2018. He wrote:

> "The decisions in the above appeals are set aside as they involve the making of an error of law in [that] the Decision Notice and Statement of Reasons cannot be reconciled so that I am satisfied that the decisions are just in all the circumstances".

24. In doing so, the District Tribunal Judge did not refer to the legal power (or powers) under which he was acting. When I issued initial observations on this appeal, I indicated I had some doubts as to whether the District Tribunal Judge had the jurisdiction to make the FTT's set aside decision. However, on further reflection I am persuaded that he did have the power to do so.

25. There is no suggestion that the District Tribunal Judge was purporting to exercise the power to set aside under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; "the 2008 Rules"), which applies only to procedural irregularities. Instead, the District Tribunal Judge must have been acting under rules 39 and 40 of the 2008 Rules. Rule 40(2) provides that the First-tier Tribunal may only undertake a review of a decision (a) pursuant to an application for permission to appeal under rule 39; and (b) if it is satisfied that there was an error of law in the decision. Plainly the District Tribunal Judge was satisfied on limb (b) of the rule 40 test. But had there been an application for permission to appeal as required under limb (a) of rule 39? The Appellant is insistent that he made no such application.

26. In a sense the Appellant is right. He did not do so in as many words. But that is not the end of the matter.

27. Rule 39(1) of the 2008 Rules provides that on receiving an application for permission to appeal, the First-tier Tribunal must first consider whether to review the decision under rule 40. But rule 41 also provides in very general terms as follows:

> "**Power to treat an application as a different type of application**
>
> 41. The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."

28. What then of the MP's letter? The MP was in no way formally registered with the First-tier Tribunal as the Appellant's representative. But it is clear he wrote his letter of 14 November 2017 with the Appellant's authority – the MP's letter began "I'm writing on behalf of…". To that extent he had the Appellant's ostensible authority to make representations to the First-tier Tribunal. True, the MP made no suggestion that the Appellant wanted to have the first Tribunal's decision set aside or appealed. However, the MP was certainly requesting clarification of the first Tribunal's decision – which was hardly surprising given what was ongoing correspondence between the DWP and the Appellant about what the first Tribunal had indeed decided as regard the amount of the recoverable overpayment. So, to that extent, the Appellant, through his MP, was asking for the first Tribunal's decision to be corrected or reviewed insofar as it referred to any overpayment figure in excess of £11,560.83.

29. As already noted, the FTT's set aside decision was short and to the point. Unpacking the implicit reasoning in that ruling, the District Tribunal Judge must have gone through the following steps: (i) to extend time under rule 5(3)(a) so as to admit the MP's letter; (ii) to consider the MP's letter as "an application for a decision to be corrected … or reviewed"; (iii) applying rule 41, to treat that application in turn and in the alternative as an application for permission to appeal under rule 39(1); (iv) thereafter to conduct a review under rule 40(2), in the course of which he was satisfied the first Tribunal's decision involved an error of law for the purpose of rule 40(2)(b); and finally (v) to set aside the first Tribunal's decision under section 9(4)(c) of the Tribunals, Courts and Enforcement Act (TCEA) 2007.

The bigger picture: conclusion

30. One might argue that the FTT's set aside decision should be found to be in error of law for inadequacy of reasons. If so, the consequence could be that the first Tribunal's decision would stand. There are at least two difficulties with such an approach. The first is that a First-tier Tribunal's decision to set aside one of its own earlier decisions is itself an "excluded decision" for the purposes of section

11(5)(d)(iii) of the TCEA 2007 and as such non-appealable (although judicial review may be available). The second is that in any event the first Tribunal's decision left matters in an utterly unsatisfactory state of affairs. At some point the mess left by the conflict between the first Tribunal's decision notices and its statement of reasons would have to be disentangled in order to provide legal certainty going forward. I therefore conclude that the first Tribunal's decision was internally contradictory and incoherent. I also conclude that the FTT's set aside decision was properly made, even if every step in the District Tribunal Judge's reasoning was not spelt out.

The Appellant's arguments

31. The Appellant has engaged in extensive correspondence with the First-tier Tribunal over the years his appeal has been in train. He has also made written representations to the Upper Tribunal. I understand his confusion and frustration about how his case has been handled. I think I can fairly summarise his main points as follows (in italics), which I address in turn.

32. *The first Tribunal decided that the correct figure for the overpayment was £11,560.83 and not a sum in the order of £30,000.* I disagree. The first Tribunal's decision was unclear. It said different things at different times.

33. *The DWP were out of time to bring an appeal against the decision of the first Tribunal.* I disagree. The DWP did not appeal the first Tribunal's decision. That decision was set aside by the First-tier Tribunal itself, having considered the MP's letter seeking clarification of the decision.

34. *The DWP have not explained how such a large overpayment could have built up when SPC is supposed to be a "top-up benefit".* For the initial period of the few months from March 2008 to July 2008, the Appellant had an entitlement to SPC which began at £83.05 p.w. and fell to £13.05 (file CE/533/2019, pp.462-471), once his undisclosed capital was taken into account. However, after 7 July 2008 (p.472), and right through to September 2013, he has a nil entitlement to SPC as his capital had exceeded £70,000 and the deemed income extinguished any such entitlement. The overpayment of just over £30,000 therefore reflects a period of five years during most of which the Appellant was receiving SPC at the rate of over £120 p.w. when by law he had no such entitlement at all (see the overpayment calculation in file CE/532/2019, p.270).

35. *The Appellant is a pensioner in poor health whose integrity is shown by the award of an Armed Forces Veterans Badge.* The Appellant may well have mitigating circumstances, but these do not affect the legal issues raised by this appeal. They may, however, be relevant to the way that the Secretary of State decides to exercise her discretion, e.g. as to how much of the overpayment to seek recovery and on what terms.

A postscript – further unseen documents unearthed from the Tribunal files

36. After reaching my decision and writing up my reasons as above, I decided to look at the administrative side of the relevant First-tier Tribunal (FTT) files for the two appeals, for reasons that will become evident.

37. I should first explain that the right-hand side (RHS) of the FTT file is a paginated bundle comprising the DWP response to the appeal followed by any further evidence or submissions received from the parties, copies of tribunal directions, rulings and its decision, etc. The DWP and the Appellant should each get a copy of every document on the RHS. It is the RHS which forms the basis of the Upper Tribunal appeal file.

38. The left-hand side (LHS) of the FTT file is not paginated but typically includes (ideally but not necessarily) in date order various internal memos, instructions from judges to tribunal staff and e.g. party correspondence which does not need to be on the RHS (e.g. a query about reimbursement of travel expenses). Documents on the LHS of the FTT file do not get into the Upper Tribunal appeal file unless they happen to be duplicated on the RHS or a specific direction is made that they should be included.

39. The reason I looked at the LHS of both files was to check whether the DWP had made any representations to the FTT office about the discrepancy between the amount of the SPC overpayment as stated on the first Tribunal's decision notice and in its statement of reasons. If they had done so, then of course such material should in any event have found its way onto the RHS. But mistakes are made. To my surprise I found two documents on the LHS which should have been included on the RHS but were omitted.

40. The first document, remarkably, is a revised statement of reasons drafted by the fee-paid Tribunal Judge who was the first Tribunal. The revised statement of reasons substitutes £30,933.73 for £11,560.83 wherever it appears. But that is not all it does. The original statement of reasons, dated 23 September 2016 and issued 13 October 2016, runs to 32 paragraphs (file CE/533/2019, pp.697-701). The revised statement of reasons runs to a total of 40 paragraphs. Paragraph 10 of the original statement of reasons was omitted and new paragraphs 32-40 were added, extending to just over one printed page. Paragraph 40 of this revised statement read as follows:

> "40. This statement corrects the original statement which although reciting my acceptance of the calculation of the overpayment as shown in pages 636-648 wrongly stated the total figure. This has now been corrected and has also been corrected in relation to the overpayments in the first 7 months. I apologise to both parties for my failings."

41. The revised statement appears to have been prompted by a request from the District Tribunal Judge to the fee-paid Tribunal Judge on 1 December 2017 to consider whether the first Tribunal's decision notice (not the statement of reasons) could be corrected under the so-called 'slip rule'. That request followed receipt of the MP's letter.

42. However, the revised statement of reasons was left on the LHS of the FTT file. There is no evidence whatsoever it was ever issued. It records the date of the statement as "23rd of September 2016 corrected 22 January 2018" but the box detailing the dates it was issued have been left blank. There is no other evidence, either from the file or the GAPS2 computer records, that the revised statement of reasons was ever issued to the parties. I am 100% confident they never received a copy – if they had, they would have referred to it in the course of the present proceedings.

43. It is futile to speculate why the revised statement of reasons was never issued. The fact is that it was not. A statement of reasons is only effective once sent to the parties (see *Secretary of State for Defence v PY (WP)* [2012] UKUT 116 (AAC); [2012] AACR 44). Furthermore, and in any event, the slip rule (rule 36 of the 2008 Rules) is for clerical mistakes and accidental errors or omissions; it does not permit the wholesale rewriting of a statement of reasons by adding a further page of text (see e.g. *AS v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 159 (AAC)).

44. The second document was an Additional Response by the DWP decision-maker dated 10 July 2018 (i.e. two days before the second Tribunal's hearing). This set out the discrepancy between the first Tribunal's decision notice and its statement of reasons and asked that the figure of £11,560.83 in the statement of reasons be corrected under the slip rule (rule 36) to read £30,933.73. The following day (i.e. the day before the second Tribunal's hearing) the FTT clerk e-mailed the DWP's Additional Response to the tribunal clerk at the hearing venue and asked for it to be shown to the Judge, issued to the parties and added to the file. There is no evidence any of these steps were taken. The second Tribunal's record of proceedings makes no mention of having received the Additional Response. In the end, this made no difference – as noted above, the first Tribunal's decision had already been set aside by the FTT's decision of 23 April 2018, some two months previously. It followed that the first Tribunal's statement of reasons was no longer effective and so there was nothing left to correct. The appeal was reconsidered entirely afresh by the second Tribunal.

45. These two documents will be issued to the parties along with this decision. I have not sought their comments on them as (a) I had already reached my decision on the appeal and (b) the documents only confirm that the first Tribunal's actual decision was to agree that the amount of the SPC overpayment was £30,933.73, as also found by the second Tribunal.

Conclusion

46. For all these reasons, the decision of the First-tier Tribunal does not involve any material error of law. I therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 25 September 2019

Nicholas Wikeley
Judge of the Upper Tribunal