IN THE UPPER TRIBUNAL **Appeal Nos: CSPIP/373/2019 (V)**
CSPIP/374/2019 (V)

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal dismisses the appeals by the appellant.

The two decisions of the First-tier Tribunal made on 19 March 2019 under references SC101/18/00824 and SC101/17/02004 did not involve any error on a material point of law and are not therefore set aside.

Representation: **Ms Whitelaw, welfare rights worker, for the claimant appellant.**

Mr McGregor, advocate, for the Secretary of State for Work and Pensions.

Hearing date: **7th July 2020 – conducted remotely by Skype for Business**

REASONS FOR DECISION

1. These appeals were decided after a remote oral hearing conducted through Skype for Business, with the representatives for both parties attending the hearing via Skype along with an observer from the Office of the Advocate General. Neither party had sought a hearing in private.

2. The hearing and the form in which it was to take place had been notified in the 'daily courts list' along with information telling any member of the public or press how they could observe the hearing at the time it took place through Skype for Business. No member of the public or press sought to attend the hearing. Furthermore, I directed pursuant to section 29ZA of the Tribunals, Courts and Enforcement Act 2007 (inserted by the Coronavirus Act 2020) that the Upper Tribunal was to use its reasonable endeavours to make a recording of these

proceedings using the Skype for Business recording facility and preserve that recording for a reasonable time in case members of the public or the press would wish to view the proceedings. I heard oral submissions at the hearing just as I would have done had we all been sitting in the tribunal room.

3. I was satisfied in all the above circumstances that the hearing therefore constituted a public hearing (with members of the public and press able to attend and observe the hearing), that no party had been prejudiced and that the open justice principle had been secured.

4. The two appeals concern entitlement to (or the lack thereof) and overpayment of Personal Independence Payment (PIP) to the appellant. The appellant had made a claim for PIP on 25 July 2013 and by a decision dated 22 January 2014 was awarded the standard rate of the daily living component and the enhanced rate of the mobility component of PIP on that claim from the date of claim to 6 January 2017. That awarding decision was superseded on 29 July 2016 to an award of the standard rate of both components of PIP, with that award taking effect from 21 May 2016 and ending on 3 April 2020.

5. However, on 8 June 2017 the Secretary of State revised all the awarding decisions and decided the appellant had had no entitlement to PIP from the outset of her claim for PIP in July 2013. The basis for the revision decision was that the awarding decisions had been made in ignorance of a material fact. By a subsequent decision of 15 June 2017, the Secretary of State decided that the appellant had been overpaid PIP amounting to £17,777.69 and that overpayment was recoverable from the appellant.

6. For the purposes of these two appeals to the Upper Tribunal an important feature of the evidence underpinning the revision and overpayment decisions of June 2017 was the video surveillance evidence conducted on behalf of the Secretary of State of the appellant.

7. The appeals by the appellant against these two decisions of the Secretary of State were heard over two days on 9 October 2018 and 19 March 2019 by the First-tier Tribunal ("the tribunal"). The tribunal upheld the Secretary of State's decision that the appellant was not entitled to PIP from and including 25 July 2013. However, the tribunal allowed in part the appellant's appeal against the recoverable overpayment decision of 15 June 2017, holding that the overpayment was only recoverable for the period 23 July 2013 to 15 August 2016 (instead of ending on the later date of 14 March 2017). At the request of Ms Whitelaw (who also acted for the appellant before the First-tier Tribunal), the tribunal provided a detailed statement of reasons covering its two decisions.

8. There is only one part of that reasoning which I need to set out. It concerns the authorisation of the video (DVD) surveillance undertaken of the appellant on behalf of the respondent. The tribunal said this about that authorisation in its reasoning (at paragraph 18 - as is commonplace this was drafted by the judge):

> "Mr Dunn [a presenting office representing the Secretary of State] produced the authorisation, which was marked "For Judge only". I considered this document and was satisfied that the surveillance had been authorised for the dates when it was carried out. Ms Whitelaw confirmed that she was not arguing that authorisation had not been granted. The tribunal was satisfied that the surveillance had been properly authorised and accordingly we allowed the DVD evidence to be viewed."

9. In giving the appellant permission to appeal Upper Tribunal Judge Wikeley (rightly in my view) focused on this passage and the "For Judge only" aspect of it. Judge Wikeley said this:

> "2. At this stage of the proceedings I only have to determine whether the grounds of appeal are arguable, not that they will necessarily succeed. Notwithstanding what appears to be a comprehensive statement of reasons, I do consider the grounds are arguable. The fact that permission has been granted should not be taken as any indication of the likely outcome of the substantive appeals, which will turn on whether it has been shown that the First-tier Tribunal materially erred in law. Given the range of issues that

arise for determination, I consider that an oral hearing of the appeals proper should be directed.

3. There is one matter on which I consider it would be helpful to have more detailed written submissions in advance of the oral hearing. This concerns the question of the authorisation of the surveillance. The following comments do not express a decided view; nor should they be seen as limiting the grounds of appeal in any way.

4. The First-tier Tribunal dealt briefly with the issue of authorisation at paragraph 18 of the statement of reasons (p.369), where it is noted that the presenting officer produced the authorisation at the hearing "which was marked 'For Judge only'". The Judge was satisfied the surveillance was duly authorised. The Appellant's representative was stated to have confirmed she was not arguing authorisation had not been granted. Finally, "The tribunal was satisfied that the surveillance had been properly authorised and accordingly we allowed the DVD evidence to be viewed." This paragraph prompts three thoughts.

5. First, if the Appellant's representative did not see the authorisation, and is a lay representative, I am not entirely sure she can be held to such a "concession", as Mr Whitaker argues (p.420, paragraph 2).

6. Second, if only the Judge saw the authorisation, then how can it be said "the tribunal was satisfied"? It appears the other two panel members did not see the authorisation, so how can they have been satisfied other than being advised at second-hand by the Judge?

7. Third, and more fundamentally, why was the authorisation for the Judge's eyes only? Mr Whitaker contends this is "standard practice" as "it contains details which are meant to be withheld" (p.420, paragraph 2). I confess I was not aware of such a "standard practice" (at least in my experience in England & Wales). What is the legislative or other authority for it? I bear in mind there are several Upper Tribunal authorities around the issue of surveillance evidence. I recall that in unreported decision *CIS/1481/2006*, Mr Commissioner Williams suggested that "the Secretary of State should, in cases such as this, produce the proper documentation about surveillance to an appellant and the tribunal together with the evidence from the surveillance on which the Secretary of State seeks to rely" (emphasis added). See also *R(DLA) 4/02*, *DG v SSWP (DLA)* [2011] UKUT 14 (AAC) and more recently *BS v Secretary of State for Work and Pensions (DLA)* [2016] UKUT 73 (AAC).

8. As a matter of first principle, decisions on the admissibility of evidence etc under rules 14 and 15 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 are for "the Tribunal", which means the First-tier Tribunal (see rule 2(3)), and so – where a matter comes up at a PIP appeal hearing – the three individuals who comprise the FTT panel. As Jacobs observes, there is no class of case management decision "that, by its nature, is reserved to the presiding judge alone" (*Tribunal Practice and Procedure*, 5th edition 2019, p.303). Furthermore, if the presenting officer did not

> wish to disclose the authorisation to the Appellant, then surely an application should have been made to the Tribunal under rule 14(3) for a non-disclosure order (although at present I am struggling to see how such an order could apply to excluding the other panel members from having sight of the authorisation).
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> 9. I have located the copy of the authorisation document in this case in a plastic wallet on the left-hand side of the FTT file in appeal SC101/17/02004. It seems to me that the Appellant's representative at the very least, and arguably the Appellant herself, should have sight of the full document in these Upper Tribunal proceedings. However, it would be wrong of me simply to add the document to the papers without further ado. The Secretary of State is accordingly given one month from the date these Directions are issued to make any reasoned application under rule 14 she considers appropriate if she takes the view that the authorisation (a) should not be disclosed at all or (b) should be disclosed but with redactions (in which case they need to be specified in detail).
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> 10. This is all without prejudice to the argument that I surmise the Secretary of State's representative might advance, namely that even if the Tribunal did err in law in some respect as to its treatment of the authorisation document, any such error was not material to the outcome of the appeals (on which see *BS v Secretary of State for Work and Pensions (DLA)*)."

(The reference by Judge Wikeley to 'Mr Whitaker' in some of the paragraphs above is because, following directions of another Upper Tribunal Judge, the Secretary of State had been asked to file submissions on the application(s) for permission to appeal.)

10. The above encapsulates the sole issue of legal substance arising on these appeals and the answer to it. In short, the tribunal erred in law by adopting the 'judge only' procedure it did in respect of the authorisation for the video surveillance but that error of law was not material to either of its decisions because, as is now agreed, the authorisation was properly made. The other arguments on which the appellant seeks to rely (for example, that the tribunal may have applied the wrong standard of proof) are on further analysis of no merit.

11. One matter I should clear out of the way at the outset concerns redactions made to certain pieces of information contained in the document authorising the video surveillance. The redacted version of that authorisation document appears in the Upper Tribunal appeal

papers and has been seen by the appellant and her representative. Certain parts of the authorisation document have been blanked out (i.e. redacted) in the copies of that document provided to the Upper Tribunal by the Secretary of State. A "Note by the respondent on the surveillance operation" accompanied that redacted authorisation document and followed paragraph 9 of Judge Wikeley's grant of permission to appeal. Paragraphs 16 to 18 of the Note read as follows:

> "16. In order to demonstrate to the Appellant and the Upper Tribunal that the authorisation was validly obtained, the Respondent has attached a redacted version of the authorisation…
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> 17. The Respondent submits that the entire authorisation should not be disclosed. In terms of Rule 14 of the Upper Tribunal Rules, there is a power to withhold disclosure of documentation. In the present case, the Respondent seeks to redact the names of individuals and techniques adopted as part of the surveillance. Disclosure has the potential to cause serious harm to future surveillance operations. The redactions proposed are proportionate. They allow the Tribunal and the Appellant to see the broad terms of the authorisation in order to show that the appropriate authorisation was in place.
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> 18. If the Appellant considers that she needs to see the unredacted authorisation, the respondent submits that she should provide a note explaining why this is appropriate."

12. Following this note, directions were made on the two appeals by Upper Tribunal Judge Markus QC in which the following of relevance was said:

> "2. The Secretary of State seeks to rely on a redacted version of the authorisation, with the effect that the redacted parts will not be disclosed to the Appellant or any other person. A copy of the redacted version is attached to the Secretary of State's submission.
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> 3. I have directed only the redacted version is provided to the Appellant and her representative. Either prior to or at the oral hearing I, or a judge delegated by me, will decide whether any of the redacted parts must be disclosed following consideration of the Appellant's reply.
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> 4. I appreciate that the Appellant is unable to address the content of the redactions, not having seen the unredacted document. However, it should be possible to make submissions as to whether she should see the unredacted document in the light of the fact that the document is relevant only to the issue of the validity of the authorisation.

> 5. I simply observe that (subject to one caveat) my present and provisional view is that the redactions proposed are reasonable and proportionate, for the reasons set out in the Respondent's note at paragraph 17. It seems to me that reliance on the redacted document does not prejudice the Appellant in making submissions on the appeal. The caveat is that I do not understand why the last sentence of the first paragraph of section 2 of the document has been redacted. Although that sentence is not relevant to the question of the validity of the authorisation, it seems to me that no part (relevant or not) should be redacted unless such is justified. The Respondent is invited to explain the basis for that redaction **in closed submissions which will not be disclosed to the Appellant at this stage** unless and until a different direction is made."

13. The appellant, through her representative did not seek sight of the unredacted authorisation for the surveillance and, as I have already set out, accepted that there was a legally valid authorisation in place for the surveillance. The respondent had filed a 'closed' response explaining why the last sentence of the first paragraph of section 2 of the authorisation document had been redacted. I am satisfied from that explanation and having read the unredacted document that that sentence had properly been redacted for the purpose of these proceedings. As I explained to the appellant's representative at the hearing, the sentence contained information which could have identified the source of the referral and so redacting that information was a reasonable and proportionate step for the respondent to take. Furthermore, having considered the matter myself afresh, and again with sight of the unredacted authorisation, I agree with Judge Markus's view that the rest of the redactions were also properly made.

14. The validity of the surveillance authorisation has thus fallen away as an issue on this appeal, if it ever was such an issue. However, I need still to explain why the tribunal erred in law, albeit not materially, in the judge only having sight of the authorisation as this may be of importance more generally.

15. The Secretary of State accepted that it had been wrong for the authorisation to have been presented for the judge only to consider. This was an error. It had been the intention for the unredacted

authorisation to be seen by all members of the tribunal. Moreover, the Secretary of State said, contrary to what Mr Whitaker had put forward, that it was and is not standard procedure for the authorisation to be provided for the judge only to consider. I am grateful for these concessions and assurances: they are clearly correct as a matter of law.

16. The explanation for the surveillance authorisation document being provided in the manner it was appears to be because the only version of the surveillance authorisation document which the presenting officer had available to provide at the hearing before the tribunal was the unredacted version. That unredacted document could and should have been seen by all members of the tribunal, as the Secretary of State accepts. (I deal below with whether the appellant and her representative should have been provided with the authorisation at or before the tribunal hearing.) It was necessary for all members of the tribunal to see and consider the authorisation because it was for the tribunal as validly constituted, and therefore for all three members of the tribunal in this case, to decide any issue arising on the appeal. That role could not and should not have fallen or been taken by just a single member of the tribunal (here the judge). This proposition seems to me to be so obvious as not to need any authority, but if such is needed then it can be found in *MB v SSWP* [2013] UKUT 111 (AAC); [2014] AACR 1 and *RK v SSWP* (ESA) [2018] UKUT 436 (AAC).

17. There was some discussion before me about whether the three members of the tribunal had in fact considered the authorisation and accepted it as being valid. This suggestion arose from the final sentence in paragraph 18 of the tribunal's reasons where it said: "The tribunal was satisfied that the surveillance had been properly authorised and accordingly we allowed the DVD evidence to be viewed". However, at best this simply means the tribunal's reasoning was unclear. If it was only the judge who saw the authorisation, as the same paragraph in the tribunal's reasons had earlier recorded, then it is difficult to see how the other two tribunal members had properly been able to come to the view that the authorisation was valid. The possible view that they did so

because the judge told them the authorisation was valid equally offends against the legal position identified immediately above. And if all three members of the tribunal in fact saw the surveillance authorisation then the first two sentences in paragraph 18 of the tribunal's reasons make no sense or at the very least are difficult to understand.

18. However, given the appellant now accepts, having had sight of the redacted authorisation, that the surveillance authorisation was validly obtained (and I can see no basis on which she could have argued for a contrary conclusion), whichever error of law is disclosed by paragraph 18 of the tribunal's reasons is not material to the decision to which it came. In these circumstances I do not need to consider what consequences, if any, may have flown if the surveillance had no proper authorisation. However, it is probably here useful to be reminded of paragraphs [16]-[19] in the reported Upper Tribunal authority of *BS v SSWP* [2015] UKUT 73 (AAC); [2016] AACR 32.

> "**Authorisation under RIPA 2000 – does it need to be proven?**
> 16. The representative's submission in this case was, in effect, that unless the authorisation (or a copy of it) was produced, the surveillance could not be shown to be lawful. There are three problems with this submission. The first is that at common law, unlawfully obtained evidence is admissible in civil litigation, if it is relevant. *Helliwell v Piggott-Sims* [1980] FSR 356 at 357 (CA) confirmed that there was no discretion to exclude evidence on the ground that it was unlawfully obtained and, in civil cases, there was no rule that such evidence should be excluded because its prejudicial effect outweighs its probative value. This is now subject to an individual's right to a fair hearing under Article 6. The requirement of fairness is, as we will see, incorporated into the rules governing Tribunal procedure. The second is that the representative's submission appears to posit the continuing application of an unabated "best evidence" rule. Although vestiges of the rule remain in courts, it has been substantially superseded by the principle that all relevant evidence is admitted. 'The goodness and badness of it goes only to weight, and not to admissibility': *Garton v Hunter* [1969] 2 QB 37; [1969] 1 All ER 451 (Denning J, as he then was). Thirdly, tribunals are not bound by the strict rules of evidence in any event.
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> 17. This was the position long before the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) and remains so. Rule 15(2) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 expressly permits a tribunal to admit evidence whether or not it would have been admissible in a civil trial in the UK. It can also exclude evidence

> that would be admissible where it would otherwise be unfair to admit it. The rule is the same for all tribunals within the TCEA 2007 system.
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> > "15. – (2) The Tribunal may –
> > (a) admit evidence whether or not –
> > (i) the evidence would be admissible in a civil trial in the United Kingdom; or
> > (ii) the evidence was available to a previous decision maker; or
> > (b) exclude evidence that would otherwise be admissible where
> > (i) the evidence was not provided within the time allowed by a direction or a practice direction;
> > (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
> > (iii) it would otherwise be unfair to admit the evidence."
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> 18. Courts and tribunals may, not unnaturally, be reluctant to exclude evidence which is reliable and probative although unlawfully obtained; and Strasbourg jurisprudence accepts in turn that there may be no unfairness in admitting such evidence when the fairness of the proceedings are considered as a whole: *Khan v UK* [2001] 31 EHRR 45.
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> 19. It may nevertheless be important for a tribunal to decide whether the disputed evidence has been lawfully obtained. Realistically, if the evidence was lawfully obtained, the prospect of its exclusion as unfair is minimal."

19. Having only an unredacted copy of the surveillance authorisation and only making it available on the day of the hearing was bound to give rise to problems, as it did. The Secretary of State was entitled to take the view that it was not appropriate for either the appellant or her representative to see the authorisation document in its unredacted form, for the same reasons they have not seen it in these Upper Tribunal proceedings. Equally, it was correct for Secretary of State to put before the tribunal (but for all three of its members) an unredacted copy of the authorisation so as to enable the tribunal to judge the extent to which that document could be disclosed to the appellant and her representative. This may at least in part explain the presenting officer's misguided attempt to limit disclosure of the unredacted authorisation document to the judge only.

20. However, even if that document had been made available to the 'Tribunal only', as Judge Wikeley pointed out it is, at a minimum, very difficult to see how the appellant or her representative could have had

any informed view about that document and its validity, or how they therefore could properly have conceded matters in relation to the surveillance authorisation document, which they had no sight of (redacted or unredacted) before the tribunal. In excluding the appellant and her representative from any consideration of the surveillance authorisation evidence put before it by the Secretary of State the tribunal further erred in law. Again, however, this error of law was not material to the decisions to which the tribunal came given the appellant's acceptance that the authorisation had been validly obtained.

21. Ms Whitelaw, however, made what might at best be described as a half-hearted attempt to argue that the appellant had been prejudiced by not having had sight of the surveillance authorisation at the time of the hearing. This was on the basis that information disclosed in the redacted version of the authorisation document contained evidence which the appellant had not had the opportunity to challenge before the tribunal. There is nothing in this argument. It is at best a theoretical argument, not one grounded on the facts of these two appeals. This is revealed when it is realised that the tribunal placed no reliance on any of the 'evidence' set out in the authorisation document itself.

22. The Secretary of State conceded that the manner and timing of her disclosure of the surveillance authorisation to the tribunal on the day of the hearing of the appeal was sub-optimal. I agree.

23. If the validity of the authorisation was in issue on the appeals then it needed to be proved, as the Secretary of State accepted (indeed submitted before me). However, it may not be an issue in all appeals - contrast *DG v SSWP* (DLA) [2011] UKUT 14 (AAC) with *LB v LB Thurrock, SSWP and HMRC* [2018] UKUT 221 (AAC) (at paragraphs [28] to [29]) – and in any event substantive issues about validity and admissibility may, for the reasons given in *BS*, have little purchase in the context of First-tier Tribunals deciding issues of entitlement to state benefits.

24. It is not clear when, if at all, the appellant sought to put the validity of the authorisation in issue on either appeal before the First-tier Tribunal. It may be that the Secretary of State wished herself to prove the fact of the authorisation unprompted, perhaps in line with the thinking in *SSWP v DC* (JSA) [2017] UKUT 464 (AAC); [2018] AACR 16 that such matters need to be proved; though the need for the Secretary of State to take such a proactive stance in *DC* was concerned with unrepresented appellants and here the appellant has been professionally represented throughout. The better view may therefore be that the presenting officer had the authorisation available in case it was put in issue by the appellant or the tribunal at the hearing. That conditional state of affairs may account for only the unredacted copy having been made available. However, even if that was the situation it is difficult to understand why the Secretary of State could not also have provided the same redacted copy to the First-tier Tribunal as she made available in these Upper Tribunal proceedings together with an explanation for the redactions. The tribunal could then have determined the extent to which the redactions were to be permitted. Rules 14 and 15 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the TPR") would plainly have covered such a procedure: see particularly rule 14(3) of the TPR.

25. However, as a matter of general approach it would seem to me that the above procedural steps ought to be taken, where possible, well before any substantive hearing of the appeal before the First-tier Tribunal. The parties - appellant and respondent – have a duty to cooperate with the First-tier Tribunal generally and in furthering the 'overriding objective' with the latter "enabling the Tribunal to deal with cases fairly and justly": see rule 2 of the TPR. In appeals such as those in these proceedings that ought to involve the representatives of both parties identifying for the First-tier Tribunal in advance of any substantive hearing whether the fact or validity of the surveillance authorisation is an issue arising on the appeal.

26. The appellant, as I have said, did not dispute that the surveillance had been properly authorised. She contended, however, as I understood her representative's arguments, that the evidence from the video surveillance (in the form of the DVDs) should not have been admitted, or if admitted given little or no weight; and she allied with this an argument that a higher standard of proof ought to have been applied by the tribunal to the surveillance evidence before it such that it ought not to have been satisfied that it had any probative value (and so should not have been admitted). There is no merit in any of these arguments.

27. Before addressing these arguments, I should say something about the number of DVDs. An issue arose at one stage about the number of the DVDs and whether (i) the two DVDs which the tribunal saw contained all that was on the original fourteen DVDs from the surveillance, and (ii) the appellant and her representative had seen all the DVDs. The issue about whether the two DVDs put before the tribunal contained all that was on the fourteen original DVDs arose at the first hearing of the appeals. The hearing of the appeals was then adjourned and, as she confirmed to me, Ms Whitelaw was provided with the 14 DVDs of the original surveillance (I assume as copies) and was able to view them. When adjourning the first hearing the tribunal had provided that if on viewing the 14 DVDs the appellant, through her representative, noted any discrepancies, such as evidence that was omitted from the 2 DVDs provided to the tribunal, she should detail these concerns in a written note for the tribunal. No such note was forthcoming and Ms Whitelaw told me that she had told the tribunal at the second hearing that there was nothing different on the fourteen DVDs when compared to the two DVDs. This accords with what she told the tribunal as set out in paragraph 32 of its reasons.

28. Reverting to the arguments against either admitting or giving any weight to the DVD evidence, I will take the burden of proof first. There is no basis in law for an argument that a more onerous burden than the civil burden of proof ought to have applied. In civil proceedings – as the

tribunal proceedings undoubtedly were – there is only one standard of proof and that is the balance of probabilities: see *In re B* (Children) [2008] UKHL 35; [2009] 1 AC 11 at paragraph [13] and (affirming *In re B*) *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17; [2010] 1 AC 678 at paragraphs [10]-[11] and [34].

29. There is also no merit in the argument that evidence properly and lawfully obtained (here the surveillance evidence) ought to have been excluded from consideration by the tribunal because the appellant had doubts as to its cogency. I struggled to understand what the proper basis of this argument was in law and agree with the Secretary of State that there is an air of unreality to it. I have not, of course, seen the DVD surveillance evidence, nor had either party asked me to do so, but on its face it was evidence showing the appellant engaged in acts which were, at the very least arguably, inconsistent with the functional difficulties on which her awards of PIP were based. That was evidence that was plainly relevant to entitlement issues the tribunal had to grapple with. I can find no basis on which it ought to have been excluded from the tribunal's consideration. Further, once before the tribunal the weight it attached to that evidence was a matter for it as the fact-finding tribunal, taking account of arguments made to it about its cogency and relevance. I again can find no basis in legal argument for the video surveillance evidence being given no weight.

30. In the end Ms Whitelaw's argument for the appellant reduced to one that the tribunal had not given adequate reasons either for admitting the video surveillance evidence or, having admitted it, accepting it as cogent evidence notwithstanding the 'Best Evidence' critique of it made on behalf of the appellant. As for the former, as there is no good reason for not admitting the evidence I fail to see what reasons could have been needed to explain why the evidence was being admitted. As it is, the tribunal gave reasons for why the video surveillance evidence was admissible (as it plainly was) and that reasoning was more than adequate.

31. As for the 'Best Evidence' critique of the DVD evidence I again fail to see why that rendered the evidence of no weight. I had that critique before me and I pressed Ms Whitelaw to explain to me what in it dealt a knock-out blow to the DVD evidence such that none of it could be considered reliable or afforded any weight. She was not able to explain this to me and nor was the same evident from the 'Best Evidence' report. Ms Whitelaw referred to something she called the "highest bar of entitlement" in this respect but could not explain what she meant by this. I suspect it was tied up with her (wrong) argument about a higher standard of proof applying.

32. Ms Whitelaw then argued, based on the Best Evidence report, that the DVD evidence ought to have been free-flowing but was not, the frames were jumping and that it was highly edited footage. However, this was just a rehash of the arguments she made to the tribunal and is not an error of law argument. The tribunal addressed these arguments in paragraph 36 of its reasons and has explained, in my clear judgment adequately, why it rejected them and gave weight to the DVD surveillance evidence.

33. Much of the rest of the arguments Ms Whitelaw put forward on behalf of the appellant fell into the same category of rearguing the evidence. I would accept that the tribunal said little in its reasoning to address the two Health Care Professional ("HCP") reports. These had provided perhaps the key evidence leading to the awards of PIP. However, there was little in the two reports which was not based on either the appellant's testimony about her problems or observations of her at the assessment. For example, in one of the reports the appellant said she was unable to walk for more than 5 to 10 yards before needing to stop and rest. That was plainly inconsistent with the tribunal's findings about the appellant's walking capability, based in part on the walking it saw the appellant doing in the surveillance evidence, and could properly form the finding the tribunal upheld that the appellant had

been misrepresenting her capabilities from the outset of her claim for PIP.

34. There may be an argument that the tribunal failed to have sufficient regard to the two HCP's professional evaluations of the appellant's capabilities when weighing the evidence in their two reports. However, this was not an argument made to the tribunal by or on behalf of the appellant and it is difficult in any event to separate out those professional assessments for the evidence on which they were based, and the latter consisted very largely of evidence and representations made by the appellant to those assessors. I am therefore satisfied that if any error of law did arise on this point it was not a material error.

35. I was also taken by Ms Whitelaw to the appellant's GP records. This was in the context of the tribunal's evaluative judgment, in paragraph 41 of its reasons, that these records did not show the appellant with any significant disabling condition in 2013. Again, however, this was no more than a rerun of evidential arguments instead of showing any error of law on the part of the tribunal. It was in my view instructive that Ms Whitelaw was unable to take me to anything in those records that showed the tribunal's assessment of the appellant's true capabilities in 2013 was plainly wrong.

36. The point that the appellant might have merited points under daily living descriptor 5b was addressed by the First-tier Tribunal when refusing the appellant permission to appeal to the Upper Tribunal. Even if an award of two points ought to have been made by the tribunal under this descriptor (based on *BS v SSWP* (PIP) [2016] UKUT 456 (AAC)), it would have made no difference to the decisions to which it came as the appellant would still not have been entitled to PIP from 2013. In other words, any error of law here was not material to the decision(s) arrived at by the tribunal.

37. This leads on to another argument the appellant sought to make through Ms Whitelaw. This was that the tribunal had failed to provide adequate reasons for why individual descriptors under the PIP legislative scheme were not met. This argument, too, is wholly lacking in merit. It is a reasons challenge in need of a home and one which had no foundation on the facts of the case. This is because it was no part of the appellant's case before the tribunal that certain individual PIP descriptors needed to be considered. The case before the tribunal was, to use Mr McGregor's phrase, an "all or nothing" one. It was the appellant's case that she remained entitled to PIP on the basis of the descriptor points which had been awarded to her throughout the period of the overpayment. The Secretary of State's case on the other hand, save perhaps for daily living descriptor 5b, was that no scoring points were merited because of the capabilities the appellant had demonstrated, inter alia, in the DVD surveillance evidence. In that context consideration of individual descriptors was not required as it could not add anything to the proper consideration of the issues which were before the tribunal in the two appeals.

38. I turn lastly to the separate arguments made concerning the tribunal's decision that the overpayment of PIP was recoverable from the appellant. There is no merit in the appellant's arguments here either. At times they consisted of arguments about what the law ought to state rather than what it in fact sets out. For example, the revision ground under regulation 9(b) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013 ("the 2013 DMA Regs") does <u>not</u> contain any test of reasonableness or reasonable expectation of knowledge, unlike the test for revision found in regulation 3(5)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the 1999 DMA Regs). All that was required for the revision ground to be satisfied in these appeals under regulation 9(b) was that the awarding decisions had been "made in ignorance of, or was based on a mistake as to, some material fact and as a

result is more advantageous to a claimant than it would otherwise have been". The 'reasonable expectation of knowledge' protection afforded to claimants under the revision rule in the 1999 DMA Regs plainly does not exist in the 2013 DMA Regs.

39. Nor can there be any serious argument that the representations made by the appellant in her PIP claim forms were (per *DG v SSWP* (DLA) [2011] UKUT 14 (AAC) at paragraphs [63] to [68]) expressions of opinion as opposed to representations of fact. Given what the appellant did say in her claim forms – for example, "I cannot bend over as I have severe back pain", "even small tasks [in preparing and cooking food] are impossible for me to do" and "I use two elbow crutches all the time" - the tribunal was well entitled to conclude on the evidence before it that these amounted to misrepresentations of facts which were material to the awards of PIP having been made. Ms Whitelaw, moreover, accepted before me that the representations on the claim forms were representations of fact. I should add that the tribunal was aware and addressed the 'opinion versus fact' distinction as Ms Whitelaw used the *DG* decision to argue that point before it.

40. As a final argument Ms Whitelaw argued that the test for recovery based on misrepresentation under section 71 of the Social Security Act 1992 ought to be subject to a test of reasonableness. That, however, is an argument for legislative reform. No such test appears in section 71. The tribunal correctly applied both section 71 and regulation 9(b) of the 2013 DMA Regs to the evidence before it and was entitled to conclude on that evidence that misrepresentations of fact made by the appellant had led to her being awarded PIP when no entitlement would have arisen had the true facts been known to the Secretary of State.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 9th October 2020