IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CPIP/932/2020
CPIP/934/2020, CDLA/1079/2020 &
CDLA/1080/2019

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

Between:

Mr M.S.

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 17 February 2021
Decided on consideration of the papers

Representation:
Appellant: Mr F. Durnian, Broudie Jackson Canter, Solicitors
Respondent: Mr W. Spencer, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow all four appeals. The decisions of the First-tier Tribunal made on 9 January 2020 under file numbers SC164/19/00012, SC164/19/00013, SC164/19/00014 & SC164/19/00159 were made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set those decisions 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 (this may be a remote or virtual hearing, e.g. by Skype or similar platform).**

2. **The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 9 January 2020 (or at the adjourned hearing on 11 September 2019).**

3. If the Appellant has any further written evidence to put before the tribunal and, in particular, further medical evidence, this should be sent to the HMCTS regional tribunal office in Liverpool within one month of the issue of this decision.

4. The Respondent should send a supplementary submission to the HMCTS regional tribunal office in Liverpool within one month of the issue of this decision. The supplementary submission should explain whether (and why) it is the Secretary of State's position that the claimant's entitlement to DLA should be superseded with effect from (i) 1 October 1998; or (ii) 1 January 2003; or (iii) some other (and if so which) date.

5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

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

REASONS FOR DECISION

This appeal to the Upper Tribunal: what this overpayment case is all about

1. "Well, this claimant has lost bang to rights", the disinterested observer might think on first reading the First-tier Tribunal's decision and statement of reasons in this case. The appeal followed a fraud investigation into the claimant's entitlement (or lack thereof) to disability living allowance (DLA) and personal independence payment (PIP) over a period of two decades.

2. By way of sketching in more of the background, the Secretary of State made a series of four decisions in 2018. These decisions had the combined effect of removing the claimant's entitlement to DLA and then PIP for a period going back some 15 years to 2003. The result was an aggregate recoverable overpayment of those disability benefits totalling just short of £100,000. The claimant lodged appeals against all the decisions. At the start of the appeal hearing, the First-tier Tribunal ('the Tribunal') warned the claimant that its powers included going back to an earlier date than 2003 (and so potentially increasing the total amount of any recoverable overpayment). After a very short break, the claimant elected to proceed. Having heard the evidence, the Tribunal decided that the period of disentitlement to DLA went back to 1998, i.e. for more than an additional four years.

3. The disinterested observer would think wrong. The claimant may or may not have been entitled to DLA and PIP but he has not "lost bang to rights". In

particular, there was a breach of his right to natural justice. So he wins in the Upper Tribunal. Whether he wins or loses at the First-tier Tribunal re-hearing remains to be seen.

These appeals to the Upper Tribunal: the result in a sentence

4. As a result, the Appellant's appeals to the Upper Tribunal succeed but there will need to be a completely fresh hearing of his combined DLA and PIP entitlement and overpayment appeals before a new First-tier Tribunal.

The background chronology

5. For present purposes the bare bones of the chronology of the claimant's DLA and PIP claims and awards history runs as follows. It seems the claimant was awarded both mobility allowance and the higher rate of attendance allowance in 1989 as a teenager. Certainly in 1992 an old-style adjudication officer (AO) made the claimant (who was then aged 17) an award of the higher rate of attendance allowance for day and night needs. This was on the basis that the claimant suffered from what the AO recognised to be "potentially life threatening" severe asthma. At some point soon thereafter these awards were converted into an award of the top rate of each component of DLA.

6. On 15 April 1996, on a renewal claim, the Secretary of State made the claimant a further award of the highest rate of the DLA care component and the higher rate of the DLA mobility component with effect from 27 August 1996.

7. On 23 October 2017 – as part of the process of transition from DLA to PIP and apparently despite the fact that a fraud investigation was already underway – a decision-maker awarded the claimant the standard rate of the PIP daily living component (10 points) and the enhanced rate of the PIP mobility component (12 points). This award of PIP was for the fixed period from 22 November 2017 to 28 September 2022.

8. On 17 November 2017, and following the claimant's request for a reconsideration, a further PIP decision was made, awarding the claimant the enhanced rate of both components (14 points for daily living and 12 points for mobility) for an indefinite period from 22 November 2017.

The DLA and PIP decisions under appeal to the First-tier Tribunal

9. In 2018, and following an investigation by the Department's Fraud and Error Service (FES), including a lengthy interview under caution, the Secretary of State's decision-makers took a total of four relevant decisions about the claimant's disability benefit entitlements and liabilities.

10. On 24 May 2018, a decision-maker made a supersession decision, changing the DLA decision dated 15 April 1996. In doing so, the decision-maker concluded that the claimant was not entitled to either the care component or the mobility component of DLA as from 1 January 2003. This date appears to have been chosen as it was when the claimant started work as a teacher, having finished college the previous summer. This was FTT appeal number SC164/19/00159, UT reference CDLA/1080/2020.

11. Two days earlier, on 22 May 2018, a different decision-maker had made a revision decision on the PIP claim, concluding that the claimant, who was now

adjudged to score zero points overall, was not entitled to either the daily living component or the mobility component of PIP as from 22 November 2017. On mandatory reconsideration the daily living score was raised to 2 points but with no effect on the outcome. This resulted in the case under FTT appeal number SC164/19/00014, UT reference CPIP/934/2020.

12. A month or so later, on 20 June 2018, the decision-makers made two overpayment decisions based on those two earlier entitlement decisions.

13. The first of these was that there had been a recoverable overpayment of DLA amounting to £93,465.25, covering the period of non-entitlement to DLA from 1 January 2003 to 21 November 2017. This was FTT appeal number SC164/19/00013, UT reference CDLA/1079/2020.

14. The second overpayment decision was that there had been a recoverable overpayment of PIP amounting to £2,802.45, covering the much shorter and more recent period from 22 November 2017 to 9 April 2018. This was FTT appeal number SC164/19/00012, UT reference CPIP/932/2020. There appears to have been no dispute as to the arithmetic of either overpayment decision.

The First-tier Tribunal's decision on the four appeals and the further appeal

15. The Tribunal, following the all-day hearing held on 9 January 2020, revised the Secretary of State's two DLA decisions and confirmed the two PIP decisions.

16. The Tribunal changed the DLA entitlement decision with the effect that the claimant's DLA was withdrawn as from 1 October 1998 (rather than, as the Secretary of State had found, as from 1 January 2003). The Tribunal explained succinctly on its decision notice that "The effective date of the decision has been changed because this is the date that [the claimant] became a student in Liverpool living alone and being fully self-caring. The Tribunal was satisfied that by that date a change of circumstances had occurred. It may have occurred sooner."

17. The Tribunal also changed the DLA overpayment decision with consequential effect, so the period of the overpayment was extended by over four years to run from 1 October 1998 through to 21 November 2017, the day before the (now revised) PIP award had begun.

18. The claimant's solicitors – who were not instructed until sometime after the Tribunal hearing – prepared detailed grounds of appeal on his behalf. The first of these grounds, and by some margin the most developed and potentially the most significant, was the contention that the Tribunal had placed undue weight on the Tribunal of Social Security Commissioners' decision in *R(IB) 2/04* and had failed to follow the cautionary guidance of Mr Commissioner Rowland (as he then was) in *CDLA/884/2008* and of Upper Tribunal Judge Bano in *DH v Secretary of State for Work and Pensions (DLA)* [2012] UKUT 330 (AAC).

19. I gave permission to appeal, notwithstanding what I described as "the First-tier Tribunal's apparently comprehensive and adverse findings of fact." I observed that the question of procedural fairness and warnings had also been considered by the Upper Tribunal in *BK v SSWP* [2009] UKUT 258 (AAC) and in *BTC v SSWP (PIP)* [2015] UKUT 155 (AAC) as well as in the Northern Ireland Commissioner's decision *C15/08-09 (DLA)*.

The First-tier Tribunal's apparently comprehensive and adverse findings of fact

20. On one reading, this was an "open and shut case". True, the claimant has experienced symptoms of breathlessness throughout his life, and as a child was diagnosed as having "severe life-threatening asthma". Subsequent medical evidence was more equivocal, but confirmed the claimant had both a respiratory condition and a rheumatic condition. However, in 1998, at the age of 23, he had left home to take up a university course in Liverpool, 150 miles away, living by himself and returning home at weekends, either by car or train and typically unaccompanied. He went to Anfield regularly to watch Liverpool FC play. In 2003 he was appointed to the first of a number of teaching roles, some of which involved dealing with children exhibiting challenging or disruptive behaviour. He accompanied school trips to Blackpool, London and abroad. Between 2002 and 2018 he had to visit the A&E Department of the local hospital on just three occasions on account of his breathing problems. Most of his teaching colleagues were completely unaware of his medical condition, except for those who had witnessed an incident at work in 2017 when he had breathing problems and had had to fetch his nebuliser from his car. In 2016 he was swimming lengths most days. This is just a summary of the Tribunal's much more extensive fact-finding.

The proceedings before the Upper Tribunal

21. However, the Secretary of State's representative in these proceedings, Mr Wayne Spencer, supports the claimant's appeal to the Upper Tribunal. He has no objections to the appeals being disposed of by way of a decision with limited or no reasons. Mr Frank Durnion, of Broudie Jackson Canter, Solicitors, for the claimant, is also content with that course of action.

22. This is, therefore, effectively an Upper Tribunal decision allowing an appeal by consent. However, I am giving reasons as this type of case plainly continues to pose problems for tribunals in practice.

The First-tier Tribunal's warning

23. As part of the preliminaries to the Tribunal hearing, and so before any oral evidence had been heard or any submissions made, the Tribunal Judge (TJ) gave the claimant what is commonly referred to as a 'warning'. This was summarised in the record of proceedings as follows:

> "TJ: explains that Tribunal could make decision, as one outcome, which changes dates of when appellant entitled to DLA/PIP – could be that finds not entitled from earlier date than 2003 as evidence at end of hearing may show that – could also find later dates after 2003 when entitled from. May find not entitled but no overpayment. TJ explains many potential outcomes – appellant needs to know them – full explanation in lay terms of law on revision and supersession".

24. The Tribunal set out its thinking and the nature of the warning in more detail in its statement of reasons:

> "64. The Tribunal had to determine whether the decision of the Respondent to find that there had been a change of circumstances in [the claimant's] condition such that he was no longer entitled to either

component of DLA from 01 January 2003 [*was correct*]. The Tribunal is an independent judicial body. Its enquiries and investigations continue up until the hearing ends and the Tribunal embarks on its deliberations. The Tribunal's view of all the evidence obtained during a hearing may lead it to make different findings and conclusions to that made by the Respondent.

65. In an appeal before the Tribunal, the outcomes are unpredictable, but the Tribunal has powers to make a different decision. These powers are not confined to allowing or disallowing the appeal. The powers are much wider in that the Tribunal may find there has been a change of circumstances but that change of circumstances occurred on a different date to that found by the Respondent. The Tribunal may find there has been no change of circumstances but that the Appellant had never been entitled to one or both of the components from the outset of the claim or from a different later date. The decision in *R(IB) 2/04* set out the powers of a tribunal to change a decision. The Tribunal applied this decision.

66. Looking at the reason for previous awards of DLA requires the Tribunal to explain why it may not agree with earlier awards as required by *R(M) 1/96*. Its enquiry covers the whole period of the claim as this is an issue raised by [the claimant]'s appeal, it is the essence of the appeal that he has a lifelong condition which has not changed. The Tribunal has to examine all the evidence to see whether it agrees with the Respondent's decision. The Tribunal cannot confirm a decision made by the Respondent if its findings of fact do not support that decision. If it finds there was no change of circumstances for instance, but finds facts which show that an award or awards was made by an official error or made because of a mistake or error as to a material fact, then the Tribunal cannot ignore those facts, pretend they do not exist or not follow the truth. The process of determining whether there has been a change of circumstances requires the Tribunal to consider what the circumstances were before the effective date to identify whether there has been a material change such that [the claimant] was no longer entitled to DLA.

67. Mindful that the Tribunal may reach a different conclusion to that of the Respondent, at the outset of the hearing the powers of the tribunal and the reasons why those powers might be exercised in order to follow the Tribunal's findings of fact were explained in detail as set out in the three foregoing paragraphs to [the claimant] and those who accompanied him. The Tribunal asked [the claimant] if he needed to seek advice from an independent source on the powers of the Tribunal to change a decision to his detriment. The Tribunal explained that one of the options could be that the Tribunal found that there has been a change of circumstances from a date earlier than 1 January 2003, the date found to apply by the Respondent.

68. It was explained that if the tribunal found that [the claimant] was not entitled to DLA from an earlier date for a variety of yet unknown reasons that this could affect any recoverable overpayment. It was stressed that may be the case or not and a finding that he was not entitled from an earlier date did not necessarily imply that the overpayment is recoverable

from him. There are distinct legal rules relating to whether a DLA overpayment is recoverable or not which have to be applied.

69. [The claimant] stated that he had been to the Citizens Advice Bureau, but they had declined to offer him any assistance. He left the room to speak with his mother, sister and son as to whether he wished to proceed on the basis that the Tribunal could make a decision that could lead to a larger overpayment that the one decided by the Respondent. After discussing his options with his family, he decided to proceed. The Tribunal had enabled a full understanding of the powers of the tribunal before the parties left so that a decision could be made."

25. The record of proceedings noted that the hearing was adjourned at 10:42 ("Parties leave to determine whether to proceed or not. TJ insists Appellant talks with his family members"). It continues with an entry timed at 10:46: "Parties return …Appellant: want to proceed".

The DLA entitlement decision

26. Mr Spencer provides the following critique of the Tribunal's DLA entitlement decision and in particular its warning:

"4. … I submit that in any event a tribunal contemplating a decision that is less favourable to a claimant than the Secretary of State's must adhere to the rules of natural justice. As Mr Commissioner Mullen said in *C15/08-09(DLA)* … at [61(vii)], the relevant authorities indicate that:

'compliance with the requirements of Article 6 includes the requirement that the appellant has had sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable, in order to enable the appellant properly to prepare his case.'

5. In this connection, an important consideration was highlighted by Judge Bano in *CSPIP/33/2015* at [7]:

'A number of disability living allowance decisions have drawn attention to the pitfalls of tribunals making decisions which are less favourable to a claimant than the decision under appeal. Even if the issue which the tribunal takes it upon itself to consider is one which is raised by the appeal (which it was in this case) and the claimant is given an adequate opportunity of considering whether to proceed the appeal, the claimant will not have had advance notice of the issue, as would be the case if the Secretary of State had been required to give grounds for opposing the appeal under Rule 24(2)(e) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008.'

6. In [the claimant's] case, during the hearing the tribunal shifted the first day of the period at issue from 1 January 2003 to 1 October 1998, which was roughly when the claimant started university (page 348, paragraph 70). The question of whether the claimant could, without any warning, marshal his memories and arguments in relation to a period of his life that was not only different from the one focussed on by the Secretary of State but was also more than 20 years ago should, I submit,

> have been a matter of anxious consideration for the tribunal. In the event, however, it passed over it in complete silence, offering the claimant an adjournment only in order to obtain advice about a tribunal's powers to give less favourable decisions (page 347, paragraph 67). In my submission, the possibility that the claimant was disadvantaged by surprise cannot be excluded with any confidence. I submit, therefore, that the tribunal's decision is erroneous in law."

27. I agree with Mr Spencer. I just note that the decision he refers to as CSPIP/33/2015 has the NCN reference *BTC v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 155 (AAC).

28. It is important to be clear as to the nature of the criticism of the Tribunal's decision. It is not that the Tribunal was wrong in principle to consider the possibility that the period of disentitlement to DLA might go back further in time than 2003. As the Tribunal of Commissioners held in *R(IS) 2/08* (emphasis in the original):

> "47. Section 12(8)(a) of the 1998 Act does not provide a complete answer. It provides that, in deciding an appeal, a tribunal need not consider any issue that is not raised by the appeal. The implication is that a tribunal must consider every issue that **is** raised by the appeal and, as a tribunal has an inquisitorial or investigative function, that includes any issue that is "clearly apparent from the evidence" (*Mongan v Department for Social Development* [2005] NICA 16 (reported as *R3/05 (DLA)*). Therefore, what a tribunal must not do is ignore an issue that is clearly apparent from the evidence. However, it does not follow that the tribunal must make a **decision** on **every** issue raised by the appeal if there is a more appropriate way of dealing with one or more issues."

29. Moreover, as another Tribunal of Commissioners noted in *R(IB) 2/04*, "Appeal tribunals conduct, at a higher and more sophisticated level, a more intensive investigation of the facts than does the Secretary of State's decision-maker" (at paragraph 91). Rather, the question is how the Tribunal then went about its business and in particular in giving its warning to the claimant. As the Tribunal of Commissioners held in *R(IB) 2/04*, the Tribunal "must bear in mind the need to comply with Article 6 of the Convention and the rules of natural justice. This will involve, at the very least, ensuring that the claimant has had sufficient notice of the tribunal's intention to consider superseding adversely to him to enable him properly to prepare his case. The fact that the claimant is entitled to withdraw his appeal any time before the appeal tribunal's decision may also be material to what Article 6 and the rules of natural justice demand" (paragraph 94). Furthermore, as Mr Commissioner Mullen (as he then was) said in *C15/08-09(DLA)*, "tribunals should refrain from making decisions less favourable to appellants than the decisions being challenged, except in the most obvious cases, or after an appropriate adjournment" (at paragraph 61(ix)).

30. Indeed, as Mr Commissioner Rowland (as he then was) observed in unreported Commissioner's decision *CDLA/884/2008*, "Tribunals need to be aware of the dangers of being both prosecutor and judge, one of which is the risk of making errors unprompted by the parties" (at paragraph 8). Nor is it necessarily sufficient to give a warning and then direct a brief adjournment for the appellant

to consider in the waiting room whether s/he wishes to proceed. As the Commissioner further explained in *CDLA/884/2008*:

> "10…. A tribunal is in a difficult position. If it gives the claimant too robust a warning at the beginning of a hearing, it runs the risk of giving the impression of having prejudged the case. If it does not give such a robust warning, the warning may not adequately convey to the claimant the case he or she needs to consider resisting with the consequence that a decision not to withdraw the appeal, or not to ask for an adjournment, is not fully informed. This is a powerful reason for tribunals refraining from making decisions less favourable to claimants than the decisions being challenged, except in the most obvious cases (e.g., where the evidence is overwhelming or the facts are not in dispute and no element of judgment is involved or where the law has been misapplied by the Secretary of State) or after an appropriate adjournment. In such obvious cases, a failure expressly to state why a tribunal has considered a point not in issue between the parties will not necessarily render the tribunal's decision erroneous in point of law; in less obvious cases, the absence of a reason for considering the point may suggest that the discretion to do so has not been exercised properly.
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> 11. If a tribunal does not consider the correctness of an award that is not directly in issue before it, it does not follow that it should do nothing if it has doubts about the award. The chairman is at liberty to draw the doubts to the Secretary of State's attention in the decision notice and can arrange for the parties to be sent a copy of the record of proceedings (including his or her note of evidence) without them having to request it. …"

31. The Tribunal doubtless saw this as one of those exceptional and "most obvious cases" which warranted making a decision on the claimant's entitlement to DLA which was less favourable than the Secretary of State's decision being challenged, to paraphrase Mr Commissioner Mullen in *C15/08-09(DLA)*. The summary of the Tribunal's findings at paragraph 20 above might be thought to support that approach. But few cases are actually that straightforward. Here, for example, there was arguably ample supportive medical evidence on file to justify the original decisions to award disability benefits back in the early- and mid-1990s. As a child, the claimant had nearly 40 admissions to hospital because of his asthma. In a letter dated 23 August 2017, which the Tribunal seem not to mention, the claimant's GP described him as still having "incredibly severe, life threatening asthma". In a further letter dated 12 June 2018, the same GP reported he had "had numerous discussions [with the claimant] about the seriousness of his condition, on occasion even discussing the real risk of death if symptoms are inadequately treated … His symptoms may appear invisible to most." The Tribunal noted that final perception as supporting its own conclusion that the claimant's symptoms did not affect him on a day-to-day basis, but without referring to the nature of the discussions to which the GP had also attested.

32. Be that as it may – and in many ways the Tribunal presented a compelling set of findings and reasons to support its decision – I agree with Mr Spencer that natural justice required more than a four minute adjournment for the claimant to

consider his options. There were three other factors, not mentioned by Mr Spencer, the combined effect of which pointed in the circumstances of this case to the necessity for an adjournment to another day if the Tribunal proposed to consider the question of pre-2003 entitlement to DLA. First, the claimant was unrepresented (making the case plainly distinguishable on its facts from *BK v Secretary of State for Work and Pensions (DLA)* [2009] UKUT 258 (AAC)). Second, the possibility of superseding the DLA entitlement decision from an earlier date was no trifling matter. It could have a significant impact on the quantification of any recoverable overpayment (in the event, the effect of the Tribunal's decision going back for more than four extra years, although not calculated in the papers before me, must have been in the order of adding a further £20,000 or thereabouts to the total overpayment owing). Third, the Tribunal had been informed by the presenting officer (and only moments before the warning was given) that the Crown Prosecution Service still had the fraud investigation files and no decision had yet been taken as to whether there would be a criminal prosecution. In the light of all those considerations, as a matter of natural justice the Tribunal, if it was contemplating that it might go back beyond 2003, should have imposed an adjournment to another day, irrespective of whether the claimant wanted "to get on with it".

The DLA overpayment decision

33. Mr Spencer submits that if the Tribunal has breached the requirements of natural justice in reaching the DLA entitlement decision, then the DLA overpayment decision built on it must also be erroneous in law. I agree.

The PIP entitlement decision

34. Mr Spencer identifies the following problem with the Tribunal's PIP entitlement decision:

> "8. The claimant's appeal was prompted by a revision of the decision originally given on his entitlement. In *R(IB) 2/04* it was said at [190] that:
>
> > 'Notwithstanding that an appeal following a decision to revise is an appeal against the original decision as revised, in a case where a ground for revision was necessary the claimant is entitled in such an appeal to argue that, taking into account only circumstances down to the effective date of the original decision, no ground for revision is established.'
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> 9. In the instant case the power to revise that was at issue was that in regulation 9(b) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, which provides that
>
> > 'A decision may be revised where the decision […] was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant than it would otherwise have been.'
>
> 10. In this context, a 'material fact' is a primary fact about the claimant's needs, and not a medical opinion (*R(M) 5/86* at [10] and *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 (reported in

> *R(DLA) 6/01*) at [9]) or an inference from a primary fact (*R(S) 4/86* at [4]). The fact must also have existed at the time of the decision under revision (*Chief Adjudication Officer v Coombe* (reported as *R(IS) 8/98*), and be such as to require that decision to be changed (*R(IB) 2/04* at [187]).
>
> 11. In my submission, the claimant, as an unrepresented layperson, could not reasonably be expected to know what legal defences were potentially available to him in relation to revision. He had to be told about this. However, neither the Secretary of State's submission nor the tribunal made the claimant aware of the legal position in advance of the hearing. In effect, the claimant only discovered the relevant law *after* his appeal was decided, and then only very briefly and incompletely (see paragraph 83 of the Statement of Reasons). In my submission, this state of affairs is too disquietingly Kafkaesque to be tolerated."

35. Again, I have to agree with Mr Spencer.

The PIP overpayment decision

36. As with the DLA decisions, Mr Spencer submits that if the Tribunal's PIP entitlement decision is flawed, then it follows that the PIP overpayment decision built on it must also be erroneous in law. Yet again, I agree.

37. Mr Spencer further explains that the Tribunal's PIP overpayment decision has problems of its own:

> "13. The point at issue before the tribunal was whether the claimant had misrepresented a material fact when claiming PIP. As was explained in *CDLA/5803/1999* … 'the claimant's answers to the mobility section of the claim pack can usually only fairly be interpreted as statements of the claimant's honest opinion' [47]. As a result, what the claimant is declaring to be correct and complete is his 'genuine belief as to the matters stated' [48]. It follows that 'there will be a misrepresentation, if the claimant does not genuinely believe that the information given is correct' [48]. In *CDLA/1661/2018* … Judge Grey QC observed at [14]: 'The same is likely to apply to a claimant's statements relating to the care component, although regard should be had to the questions that are being answered.' In my submission, these principles apply equally to PIP. However, the claimant was not made aware of them before the tribunal hearing, an omission that derived of an opportunity to prepare a defence as to what he genuinely believed when he made his claim. Once again, the claimant only found out about the matters on which his appeal depended after it was rejected."

What happens next: the new First-tier Tribunal

38. I allow the four appeals and set aside the First-tier Tribunal's decisions. There will need to be an entirely fresh hearing of the appeals before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decisions, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the claimant was entitled to DLA and/or PIP (and, if so, which component(s) and at what rate(s) and for what period(s)). Nor am I making any finding or expressing any view on whether any overpayment of either benefit (if

such be found) is recoverable from the claimant. That is all a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact. The fact that Mr Spencer supports the appeal to the Upper Tribunal on several points of law should not be read as suggesting that the Secretary of State's representative necessarily supports the re-heard first instance appeal on its factual merits.

39. In fairness to the claimant, the Secretary of State's representative should send a supplementary submission to the HMCTS regional tribunal office in Liverpool within one month of the issue of this decision. The Respondent's supplementary submission should explain whether (and why) it is the Secretary of State's position that the claimant's entitlement to DLA should be superseded with effect from (i) 1 October 1998; or (ii) 1 January 2003; or (iii) some other (and if so which) date.

Conclusion

40. I therefore conclude that the decisions of the First-tier Tribunal involve errors of law. I allow the appeals and set aside the decisions of that tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case as a whole 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.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 17 February 2021