IN THE UPPER TRIBUNAL **JR/3861/2016**
ADMINISTRATIVE APPEALS CHAMBER **CE/766/2016**

Before: Mr Justice Charles
Upper Tribunal Judge Wikeley
Upper Tribunal Judge Wright

DECISIONS

JR/3861/2016

In the judicial review by CJ:

1. **It is DECLARED that on the proper construction of section 12 of the Social Security Act 1998 and the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the 1999 Regulations) that a claimant, from whom the Secretary of State receives a revision application under Regulation 3ZA(2) of the 1999 Regulations, and to whom the Secretary of State responds by stating that the application is late and does not meet the criteria for extending time under the 1999 Regulations, has a statutory right of appeal to the First-tier Tribunal against the decision of which revision had been sought.**
2. **The Respondent shall pay the Applicant CJ's costs to be assessed on the standard basis if not agreed. CJ's publicly funded costs shall in any event be the subject of a detailed assessment.**

CE/766/2016

In the appeal by SG:

1. **The appeal is allowed as the decision of the First-tier Tribunal of 12 November 2015 under reference SC303/15/00661 involved an error on a material point of law.**
2. **However, that decision of the First-tier Tribunal is not set aside because the decision sought to be appealed was subsequently revised in the appellant's favour by the Secretary of State.**

The decision on SG's appeal is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

In both JR/3861/2016 and CE/766/2016

1. **The time for seeking permission to appeal is abridged to expire on 15 September 2017.**

Representation: Stephen Knafler QC and Tom Royston (instructed by CPAG) for CJ and SG.

Martin Chamberlain QC and Katherine Apps (instructed by GLD) for the Secretary of State for Work and Pensions.

REASONS FOR DECISIONS

Introduction

1. These cases both concern the extent of the right of social security claimants to challenge before the independent First-tier Tribunal (the FTT) certain decisions by the Secretary of State on their entitlement to social security benefits. Although technically we only have the two cases before us, the outcome of these proceedings is likely to affect (at the very least) many thousands of other cases. The particular issue with which we are concerned is whether social security claimants have a right of appeal to the FTT where they make a late request for a mandatory reconsideration of the Secretary of State's decision on entitlement, and where the Secretary of State does not exercise his power to extend time.

2. In barest summary, Mr Chamberlain QC for the Secretary of State submits that, in such circumstances, the claimant's only recourse is to challenge the Secretary of State's decision not to extend time by way of an application for judicial review. Mr Knafler QC, for the two claimants in these proceedings, namely CJ (in the judicial review) and SG (in the statutory appeal), argues that such a claimant still has the right of appeal to the FTT, notwithstanding the late request for a mandatory reconsideration. For the reasons that follow, we find that such a claimant has a right of appeal to the FTT.

3. As we shall return to, the critical legal issue is whether by not extending time for a late request for mandatory reconsideration the Secretary of State "has considered whether to revise the decision".

4. Since the Social Security Act 1998 (the "1998 Act") the three ways in which an original decision on a benefit claim under section 8 thereof can be changed have been revision (under section 9 of the 1998 Act), supersession (under section 10) and appeal (under section 12). The mandatory reconsideration

requirement was introduced into (or rather shoehorned into) the social security adjudication machinery by the Welfare Reform Act 2012. By way of context, it is helpful at this stage to compare and contrast (if only in outline) the statutory regime for appealing decisions on benefit claims as in place respectively both before and after the introduction of mandatory reconsideration (MR). In doing so we necessarily focus on the process of *revision* (broadly a means of changing the decision from its originally effective date) and for present purposes disregard *supersession* (typically a way of changing an existing benefit decision from a later date, e.g. because of a change in circumstances).

5. Before the introduction of MR, a dissatisfied claimant could ask for a benefit decision to be revised either on any ground within one month or subsequently at any time but in that event only on one or more of certain prescribed grounds. Quite independently, a claimant also had one month in which to appeal on any ground to the FTT against the decision. When a claimant appealed to the FTT within or outside the one month time limit, as a matter of departmental practice, it was commonplace for the appeal to be reconsidered internally to identify whether there were any grounds to revise the decision, so negating the need for the appeal to proceed. If the appeal was made outside the one month time limit, it was treated as in time if the departmental decision-maker did not object, providing it was received within the absolute time limit of 13 months from the date of the original decision. If the departmental decision-maker objected, the FTT could decide to extend time. Crucially, it was always for the FTT (and not the DWP, HMRC or local authority, depending on the benefit concerned) to decide whether the appeal had been made within the time limit and whether or not time should be extended. In other words the FTT, not the relevant Department, acted as gatekeeper to the independent and judicial dispute resolution system.

6. After the introduction of MR, and under the regime now in place, a dissatisfied claimant can still ask for a benefit decision to be revised, again whether on any ground within one month or after that period but then only on a prescribed

ground. The difference, however, is that now claimants have no immediate right to go straight to appeal. Instead, if they wish to challenge the decision, they are required within one month to apply for a "mandatory reconsideration" – in effect, a revision – of the original decision. It is only when they have received a MR notice from the Secretary of State's decision-maker (assuming the decision is not changed entirely in their favour) that they can lodge an appeal with the FTT (within one month).

7. So, in short, what was in effect a one-step process (appeal and in practice reconsideration by the relevant Department) has become a two-stage process (mandatory reconsideration and then appeal). The claimants' challenge in these proceedings is not to the two-stage MR process, but to its application and effect.

8. A potential pinch point in the MR procedure occurs if the claimant does not apply for a MR within a month of being notified of the original decision. In this event the parties' respective positions are starkly summarised at paragraph 2 above. So in those circumstances Mr Chamberlain submits that – absent either the Secretary of State's decision-maker unilaterally reconsidering the matter and agreeing to look again at an otherwise out-of-time MR request or the claimant making a successful application for judicial review – the right of appeal to the FTT is effectively lost. To all intents and purposes – we return later to the possibility of judicial review – the Secretary of State has become gatekeeper to the independent tribunal system. Mr Knafler, in contrast, argues that the claimant who is late with their MR request still has the right to have their case considered by the FTT on its merits.

<u>The two cases now before the Upper Tribunal</u>

9. The present two cases have reached the Upper Tribunal by different routes. CJ's case (JR/3861/2016, formerly CO/6100/2016 in the Administrative Court) is a judicial review while SG's case (CE/766/2016) is a statutory appeal of the type which (on its bare facts at least) is bread-and-butter work for the

Administrative Appeals Chamber of the Upper Tribunal. We set out in an appendix to this decision the relevant facts of both cases in more detail, based on the agreed statement of facts helpfully submitted by the parties, but with some commentary of our own. For present purposes the factual background of the two cases can be usefully summarised as follows.

10. CJ and SG, who have mental health issues along with other problems, each claimed employment and support allowance (ESA) and attended a 'face to face' assessment. Decision-makers decided in both cases that the claimants did not qualify for ESA and advised them of the time limit for seeking a MR. Both claimants applied late for a MR (5 months late in CJ's case and 10 months late in SG's case). In both cases the Secretary of State refused to accept that the claimants' extenuating circumstances justified extending time. Both claimants sought to appeal to the FTT, which declined to admit their appeals. Supported by the Child Poverty Action Group (CPAG), both claimants sent the Secretary of State a letter before action, challenging the lawfulness of the procedure adopted. The Secretary of State then agreed in both cases to reconsider the refusal to undertake a MR. At this juncture the paths of the two cases diverged, albeit they ended up at the same end point.

11. In CJ's case the Secretary of State's decision-maker confirmed the original decision refusing entitlement to ESA. CJ then in parallel both lodged an appeal to the FTT and issued a judicial review claim in the High Court. The Upper Tribunal subsequently granted permission to apply for judicial review on January 27, 2017; in the event, CJ's statutory appeal before the FTT on her ESA claim succeeded on March 23, 2017 (her points score for the ESA descriptors increasing from 6 to 21 points - the relevant threshold being 15 points).

12. In SG's case the Secretary of State's decision maker, having agreed to look again at the MR request, revised the original decision refusing entitlement to ESA, and so SG was awarded benefit without her having to pursue her appeal before the FTT. The FTT, however, granted permission to appeal to the Upper

Tribunal (it is unclear whether the FTT knew that the Secretary of State had revised his decision when it gave SG permission to appeal). On January 27, 2017 the Upper Tribunal directed that both cases be heard together before a three-judge panel.

13. So, by the time of the substantive Upper Tribunal hearing, both claimants had been awarded ESA – in both cases the Secretary of State had agreed to reconsider the MR request, in the event awarding ESA in SG's case and refusing it in CJ's case, although that refusal was then overturned by the FTT on appeal. However, both cases squarely raised the issue of the proper application of the relevant legislation in cases where a MR request has been made late, i.e. outside the one month time limit. To that extent they are representative as test cases.

The proceedings before the Upper Tribunal

14. Initially, the Secretary of State raised the point that the issues involved in both CJ's judicial review and SG's appeal were academic.

15. By an order dated 12 October 2016, this Tribunal recorded in SG's case that:

(a) for the avoidance of doubt (given the uncertainty referred to in paragraph 12 of this decision) permission for the appeal was granted,

(b) the same or similar points had been raised in other appeals, and

(c) directions were issued that a case management hearing be held.

16. By an order dated 19 December 2016, the judicial review in CJ was transferred from the Administrative Court to the Upper Tribunal with a direction that it be listed for hearing simultaneously with the case management hearing in SG.

This was to consider whether to extend time to grant permission to apply for judicial review and any other appropriate directions.

17. At the case management hearing on 27 January 2017, the Secretary of State, through counsel, acknowledged that the underlying issues in the appeal and the judicial review were important and of wide application and asserted that the Secretary of State was keen to have them resolved. Arguments that the issues were academic and opposition to permission for judicial review being granted therefore fell away. This Tribunal directed that the appeal and the judicial review should be heard together at a hearing that would address defined issues and gave CJ permission to apply for judicial review in respect of those issues only.

18. The defined issues were as follows:

(a) whether, on a correct interpretation of section 12 of the Social Security Act 1998 and regulations 3, 3ZA and 4 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the 1999 Regulations") – including by reference to (i) the scope of the power conferred by the enabling legislation/*Padfield* purpose; (ii) the principle of legality/ *Witham*; (iii) common law fairness; and (iv) Art 6 ECHR and section 3 of the Human Rights Act 1998 – a claimant, from whom the Secretary of State receives a revision application, to whom the Secretary of State responds by stating that the application is late and does not meet the criteria for extending time, has a statutory right of appeal to the First-tier Tribunal; and

(b) whether, if the answer to the first question is "no", any of regulations 3, 3ZA and 4 of the 1999 Regulations are incompatible with Art 6 ECHR such that they must be disapplied pursuant to section 3 of the Human Rights Act 1998.

19. The first of these two defined issues thus linked and confined possible free standing grounds of public law challenge to the arguments on statutory interpretation. The second defined issue reintroduced point (iv) under issue (a) in an alternative way and becomes relevant if, as a matter of interpretation, the 1999 Regulations deprive such claimants of that right of appeal.

Preliminary comments

20. We are pleased to record that the Secretary of State's original stance of opposing the resolution of the issues because he had revisited his decision on lateness and so rendered these cases academic was not pursued. In that context we are aware that the FTT has been troubled by the jurisdictional issues raised by these proceedings in other cases as well.

21. However, in the present two cases the Secretary of State's reconsideration and change of position on lateness was not accompanied by any convincing explanation of the reasons why he had concluded that his initial decision in not giving an extension was wrong. Nor did he give an identification of the power he was exercising to look at the cases again after the claimants had obtained assistance and threatened judicial review.

22. It was, however, common ground that the Secretary of State has a general power to revisit his decisions on lateness, whether or not a judicial review is threatened. In contrast, as appears below, the 1999 Regulations preclude a renewal of a request for an extension of time. However, we also note that by regulation 3ZA(5) the Secretary of State can, where there is no right of appeal, treat a purported appeal as an application for revision.

23. We consider that it is important not to lose sight of the fact that an appeal to the FTT is a full reconsideration of the merits of the claim for the benefit and, subject to any further appeal, its decision is final. Accordingly, it is a right of appeal that enables the citizen to have their entitlement to benefit decided by

an independent and judicial decision maker. We return to this matter in greater depth later. However, for the present this takes us to the new statutory framework for MR and appeals and its rationale.

The justification for mandatory reconsideration

24. The term "mandatory reconsideration" does not appear in the legislation. It is an expression used by the Secretary of State to describe the process of reconsideration of an original decision on entitlement and amount of benefit. The restriction introduced by the Welfare Reform Act 2012 is, as we have already noted, that the right of appeal to the FTT against a decision arises "*only if the Secretary of State has considered whether to revise the decision under section 9*" (section 12(3A) of the 1998 Act as amended). As the Secretary of State submitted to us in his skeleton argument, the broad purpose of the relevant provisions was to enable the Secretary of State to have "the first opportunity to consider the correctness of the decision, including any new material which is often submitted on an appeal, and thereby prevent the need for the case to progress to appeal".

A short digression: we have been here before

25. The MR requirement introduced by the Welfare Reform Act 2012 and the accompanying secondary amending legislation is not the first time that a compulsory review stage has been interposed in the statutory appeals machinery for social security claims. In the 1990s earlier legislation (since repealed by the 1998 Act) required claimants to seek a review before being able to appeal a decision relating to attendance allowance (AA), disability living allowance (DLA) and the now-abolished disability working allowance (DWA). In that context Professor Roy Sainsbury commented as follows in his chapter entitled "Internal Reviews and the Weakening of Social Security Claimants' Rights of Appeal" in *Administrative Law and Government Action* (eds. G. Richardson and H. Genn, Clarendon Press, Oxford, 1994, at pp.294-5, footnotes omitted):

> "The appeal system for [AA, DLA and DWA] is far closer to the mainstream model than either housing benefit or the social fund. Its one important point of departure is the introduction of the mandatory internal review stage before an appeal to a tribunal may be lodged.
>
> In contrast to the rationale presented for the introduction of social fund reviews, the justification for the arrangements for the new disability benefits appears limited to their relative speed. In the DSS paper on the adjudication arrangements for the new disability benefits, the government proposed 'to introduce a streamlined review system as a second tier of adjudication.' The only difference between this 'streamlined' system and the mainstream adjudication system was to make the internal review a formal stage which claimants must complete prior to a tribunal hearing. It was justified in the following way: 'The advantage of adding this formal review stage is that decisions will be looked at, and changed if they are wrong, very much more quickly than would be possible if the claimant appealed against the first decision straight to a Social Security Appeal Tribunal.' Behind the rhetoric of 'streamlining', the argument that the new arrangements would be quicker is disingenuous. The mainstream adjudication model, with direct access to a tribunal, still allows DSS adjudication officers to review and change decisions if they are wrong.... The new structure does not in itself guarantee quicker decisions but requires the dissatisfied claimant to appeal twice before receiving an independent hearing."

26. We would echo Professor Sainsbury's scepticism on assertions that streamlining and a mandatory review have real advantages in avoiding unnecessary appeals that have merit. This is because under the 1998 Act (and indeed under the previous statutory scheme) it has always been, and remains, the case that the Secretary of State could (and often did) treat the appeal as an application for revision and revise the decision before it reached the FTT. Moreover, the experience of two members of this three-judge panel from many years of sitting in the First-tier Tribunal (and its predecessors) was that revision decisions taken after an appeal had been made did not cause any significant administrative problem for tribunals.

<u>The key provisions of the primary legislation – the 1998 Act</u>

27. Section 102(1)-(4) of the Welfare Reform Act 2012 effected the changes to section 12 of the Social Security Act 1998 which introduced the requirement for a revision to be considered before an appeal can be lodged against a decision in a social security case. The same provision also introduced

materially identical changes to the Child Support Act 1991, which governs appeals in child support cases. Relevantly, section 12 now provides as follows (we have highlighted in bold the key provisions on which the cases before us turn):

> "12.—(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which–
>
> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
>
> (b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act;....
>
> (2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal, but nothing in this subsection shall confer a right of appeal –
>
> (a) in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision, or
>
> **(b) where regulations under subsection (3A) so provide.**
>
> (3) Regulations under subsection (2) above shall not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required.
>
> **(3A) Regulations may provide that, in such cases or circumstances as may be prescribed, there is a right of appeal under subsection (2) in relation to a decision only if the Secretary of State has considered whether to revise the decision under section 9.**
>
> **(3B) The regulations may in particular provide that that condition is met only where–**
>
> **(a) the consideration by the Secretary of State was on an application,**
>
> **(b) the Secretary of State considered issues of a specified description, or**
>
> **(c) the consideration by the Secretary of State satisfied any other condition specified in the regulation.**
>
> .....

> (6) A person with a right of appeal under this section shall be given such notice of a decision to which this section applies and of that right as may be prescribed.
>
> **(7) Regulations may**-
>
> (a) make provision as to the manner in which, and the time within which, appeals are to be brought;
>
> (**b) provide that, where in accordance with regulations under subsection (3A) there is no right of appeal against a decision, any purported appeal may be treated as an application for revision under section 9**.
>
> (8) In deciding an appeal under this section, the First-tier Tribunal–
>
> (a) need not consider any issue that is not raised by the appeal; and
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.
>
> (9) The reference in subsection (1) above to a decision under section 10 above is a reference to a decision superseding any such decision as is mentioned in paragraph (a) or (b) of subsection (1) of that section."

28. Put shortly, the issue in both these cases is whether the subsection (3A) condition precedent to making an appeal – *"the Secretary of State has considered whether to revise"* – is (or is not) satisfied by his deciding not to extend time (applying the relevant test for a late application for revision pursuant to the regulations made under section 12).

The key provisions of the secondary legislation – the 1999 Regulations

29. The Social Security and Child Support (Decisions and Appeals) Regulations 1999 provide so far as is relevant, again with our highlighting, as follows:

> "**Revision of decisions**
>
> **3.**—(1) Subject to the following provisions of this regulation, any decision of the Secretary of State……under section 8 or 10 ("the original decision") **may be revised by him…**.if–
>
> (a) **he….. commence[s] action leading to revision** within one month of the date of notification of the original decision; or

(b) **an application for a revision is received by the Secretary of State**....at the appropriate office–

(i)....., within one month of the date of notification of the original decision;

(ii) where a written statement is requested under paragraph (3)(b) of regulation 3ZA or paragraph (1)(b) of regulation 28 and is provided within the period specified in head (i), within 14 days of the expiry of that period;

(iii) where a written statement is requested under paragraph (3)(b) of regulation 3ZA or paragraph (1)(b) of regulation 28 and is provided after the period specified in head (i), within 14 days of the date on which the statement is provided; or

(iv) within such longer period as may be allowed under regulation 4.

(2) Where the Secretary of State..... requires further evidence or information from the applicant in order to consider all the issues raised by an application under paragraph (1)(b) ("the original application"), he shall notify the applicant that further evidence or information is required and the decision may be revised–

(a) where the applicant provides further relevant evidence or information within one month of the date of notification or such longer period of time as the Secretary of State..... may allow; or

(b) where the applicant does not provide such evidence or information within the time allowed under sub-paragraph (a), on the basis of the original application.....

(4A) Where there is an appeal against an original decision (within the meaning of paragraph (1)) within the time prescribed by the Tribunal Procedure Rules but the appeal has not been determined, the original decision may be revised at any time.

(5) A decision of the Secretary of State..... under section 8 or 10–

(a) which arose from an official error; or

(b) except in a case to which sub-paragraph (c) or (d) applies, where the decision was made in ignorance of, or was based upon a mistake as to, some material fact and as a result of that ignorance of or mistake as to that fact, the decision was more advantageous to the claimant than it would otherwise have been but for that ignorance or mistake

(c) subject to sub-paragraph (d), where the decision is a disability benefit decision, or is an incapacity benefit decision where there has been an incapacity determination or is an employment and support allowance decision where there has been a limited capability for work determination (whether before or after the decision), which was made in ignorance of, or was based upon a mistake as to, some material fact in relation to a disability

determination embodied in or necessary to the disability benefit decision, the incapacity determination or the limited capability for work determination, and

> (i) as a result of that ignorance of or mistake as to that fact the decision was more advantageous to the claimant than it would otherwise have been but for that ignorance or mistake and,
>
> (ii) the Secretary of State is satisfied that at the time the decision was made the claimant or payee knew or could reasonably have been expected to know of the fact in question and that it was relevant to the decision,

may be revised at any time by the Secretary of State.

Consideration of revision before appeal

3ZA.—(1) This regulation applies in a case where–

(a) the Secretary of State **gives a person written notice** of a decision under section 8 or 10 of the Act (whether as originally made or as revised under section 9 of that Act); and

(b) that notice **includes a statement to the effect that there is a right of appeal in relation to the decision only if the Secretary of State has considered an application for a revision of the decision**.

(2) **In a case to which this regulation applies, a person has a right of appeal under section 12(2) of the Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of the Act.**

(3) The notice referred to in paragraph (1) must inform the person–

(a) of the time limit specified in regulation 3(1) or (3) for making an application for a revision; and

(b) that, where the notice does not include a statement of the reasons for the decision ("written reasons"), he may, within one month of the date of notification of the decision, request that the Secretary of State provide him with written reasons.

(4) Where written reasons are requested under paragraph (3)(b), the Secretary of State must provide them within 14 days of receipt of the request or as soon as practicable afterwards.

(5) **Where, as the result of paragraph (2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 9 of the Act.**

Late application for a revision

4.—(1) The time limit for making an application for a revision specified in regulation 3(1) or (3) **may be extended where the conditions specified in the following provisions of this regulation are satisfied.**

(2) An application for an extension of time shall be made by the claimant or a person acting on his behalf.

(3) An application shall–

(a) contain particulars of the grounds on which the extension of time is sought and shall contain sufficient details of the decision which it is sought to have revised to enable that decision to be identified; and

(b) **be made within 13 months of the date of notification of the decision which it is sought to have revised,** but if the applicant has requested a statement of the reasons in accordance with regulation 3ZA(3)(b) or regulation 28(1)(b) the 13 month period shall be extended by–

(i) if the statement is provided within one month of the notification, an additional 14 days; or

(ii) if it is provided after the elapse of a period after the one month ends, the length of that period and an additional 14 days.

(4) **An application for an extension of time shall not be granted unless the applicant satisfies the Secretary of State……..that–**

(a) it is reasonable to grant the application;

(b) the application for revision has merit, except in a case to which regulation 3ZA or 3B applies; and

(c) special circumstances are relevant to the application and as a result of those special circumstances it was not practicable for the application to be made within the time limit specified in regulation 3.

(5) In determining whether it **is reasonable to grant an application,** the Secretary of State……..**shall have regard to the principle that the greater the amount of time that has elapsed** between the expiration of the time specified in regulation 3(1) and (3) and regulation 3A(1)(a) for applying for a revision and the making of the application for an extension of time, **the more compelling should be the special circumstances on which the application is based.**

(6) In determining whether it is reasonable to grant the application for an extension of time, **except in a case to which regulation 3ZA or 3B** applies, no account shall be taken of the following–

(a) **that the applicant or any person acting for him was unaware of or misunderstood the law applicable to his case (including ignorance or misunderstanding of the time limits imposed by these Regulations); or**

> (b) **that the Upper Tribunal or a court has taken a different view of the law from that previously understood and applied.**
>
> (7) **An application under this regulation for an extension of time which has been refused may not be renewed.**"

Further relevant provisions of the 1998 Act

30. Section 8 of the 1998 Act is concerned with what may be termed the original decision and provides, so far as is relevant, as follows:

> "8. –(1) Subject to the provisions of this Chapter, it shall be for the Secretary of State –
> (a) to decide any claim for a relevant benefit;
> (b) .....
> (c) .....to make any decision that falls to be made under or by virtue of a relevant enactment...
> (2) Where at any time a claim for a relevant benefit is decided by the Secretary of State-
> (a) the claim shall not be regarded as subsisting after that time; and
> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time."

31. It is not disputed that ESA is a "relevant benefit" (see section 8(3)(ba)). Nor is it disputed that the Welfare Reform Act 2007, which introduced ESA as a benefit, is a "relevant enactment" (see section 8(4)). However, nothing of any significance turns on either of these points. This is because CJ and SG have abandoned their argument that, as a matter of statutory construction, there is a separate right of appeal against the decision under regulation 4 of the 1999 Regulations refusing to extend time to allow a late application for revision to be admitted. (We simply observe that this may well have been a sensible course of action for them to take in the light of *R(TC) 1/05* and *R(IS) 15/04*.)

32. The revision referred to in section 12(3A) is made under section 9 of the 1998 Act. That provides as follows:

> "9. – (1) Any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State-
>
> (a) either within the prescribed period or in prescribed cases or circumstances; and

> (b) either on an application made for the purpose or on his own initiative;
> and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Subject to subsections (4) and (5) and section 27 below, a revision under this section shall take effect as from the date on which the original decision took (or was to take) effect.
>
> (4) Regulations may provide that, in prescribed cases or circumstances, a revision under this section shall take effect as from such other date as may be prescribed.
>
> (5) Where a decision is revised under this section, for the purpose of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it is so revised.
>
> (6) Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under this section before the appeal is determined."

33. For completeness, we again mention supersession because this is an alternative route to changing a substantive decision on a claim for benefit. This is provided for in section 10 of the 1998 Act which, again insofar as is relevant, provides:

> "10.—(1) Subject to subsection 3, the following, namely–
>
> (a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above; and
>
> (b) any decision under this Chapter of the First-tier Tribunal or any decision of the Upper Tribunal which relates to any such decision,
>
> may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
>
> ...

> (5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.
>
> (6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may be prescribed."

34. As already noted above, the key contrast between revision and supersession is identified by sections 9(3) and 10(5). Subject to exceptions, generally speaking a successful revision takes effect from the date of the original section 8 decision whereas a successful supersession of the decision made under section 8 may only take effect from the date the supersession request was made or was decided.

The core point of contention

35. As we noted at paragraph 2 above, Mr Chamberlain's central submission was that where a claimant makes a late request for a MR, which is refused on time grounds, then their only recourse is to challenge the Secretary of State's decision by way of an application for judicial review. Mr Knafler, in contrast, argued that such a claimant enjoys the right of appeal to the FTT, notwithstanding the late request for a mandatory reconsideration. Unpicking the parties' submissions further, it seems to us that the core point of contention between the parties is the true nature of such a late request.

36. Mr Chamberlain's argument is that in considering a late MR request the statutory scheme distinguishes between two juridically separate acts. The first is the Secretary of State's consideration of whether to extend time to admit the late MR application. The second is the Secretary of State's consideration of whether to revise the original decision on the claim for benefit. Those two actions may be undertaken by a decision maker at the same time, but in Mr Chamberlain's submission they remained conceptually discrete juridical acts. If time is not extended, then the claimant's right of appeal to the FTT is not

triggered as there has been no consideration of whether to revise under section 9.

37. Mr Knafler's submission is that the legislation makes no provision for such a two-stage process. He argues that an application for a revision is not deprived of the character of being such an application merely by virtue of being late. He contends that the right of appeal is triggered by the Secretary of State's decision-maker considering a MR request and deciding how to dispose of it.

The Upper Tribunal's analysis

The legislative scheme: two important principles of statutory construction

38. We bear in mind two important principles of statutory construction.

39. The first is the importance of identifying the statutory mischief. By way of context, we have already referred to, and agreed with, the Secretary of State's description of the stated policy underpinning the introduction of the MR requirement. We have also seen the Explanatory Notes to what became section 102 when the Bill that became the Welfare Reform Act 2012 was being considered in Parliament. We have considered these Notes in the context (*per* Lord Steyn in *R(Westminster CC) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956), of seeking to identify "the objective setting or contextual scene of the statute, and the mischief at which it is aimed" (and see to identical effect Lord Steyn again at paragraph [4] of *R(S) v Chief Constable of South Yorkshire* [2004] UKHL 39; [2004] 1 WLR 2196). The Explanatory Notes, so far as material, said as follows (what was to become section 102 was at the time clause 99 in the Bill):

> "**Clause 99: Power to require consideration of revision before appeal**
>
> 486. Section 12 of 1998 Act makes provision for a claimant (or any other prescribed person) to appeal to the First-tier Tribunal against a decision of the Secretary of State. Although the claimant (or other person) could ask initially for the decision to be reconsidered with a view to revision (under section 9 of the Act), in practice many people do not do so and make an appeal from the outset.

> 487. In order to resolve more disputes with claimants through the internal reconsideration process before an appeal to the tribunal is made, subsections (2) and (3) of clause 99 amend section 12 to enable the Secretary of State to make regulations setting out the cases or circumstances in which an appeal can be made only when the Secretary of State has considered whether to revise the decision.
>
> 488. New section 12(3B), which is inserted by subsection (3), contains examples of how the new power might be used. In particular, regulations may provide that there is to be a right of appeal only where the Secretary of State has considered whether to revise the decision as a result of an application having been made for that purpose…….
>
> 490. Where there is no right of appeal as a result of regulations made under the new provisions, subsection (4) enables provision to be made in regulations for treating any purported appeal as an application for revision……."

40. The justification advanced in the Explanatory Notes was thus framed in terms of streamlining the appellate process and – in accord with fundamental principles of administrative justice – helping to get decisions 'right first time' (or at least 'right at the second time of asking'). There was not even the faintest hint of a suggestion in those Notes that if a claimant was late in making a mandatory reconsideration request, but still within the further discretionary period in which the FTT might permit a late appeal, then the Secretary of State would effectively have the power to exclude the claimant's right of appeal on the merits to an independent tribunal, subject only to challenge by way of a claim for judicial review.

41. The second principle of construction is that we must begin with the primary legislation. Thus the starting place for construing the statutory scheme must be the Act of Parliament in which the right of appeal to the FTT is conferred and also, so it is said by the Secretary of State, in which it has been restricted. This starting place is not to ignore the 1999 Regulations, made under the power the 1998 Act confers, but some caution in our judgement must be exercised in using them to construe the meaning of section 12 of the 1998 Act. We bear in mind that despite Arden LJ's enthusiasm for doing so, the Court of Appeal declined to take account of the 1999 Regulations when construing other aspects of section 12 of the 1998 Act in *Campbell v Secretary of State for Work and Pensions* [2005] EWCA Civ 989. The majority of the Court of

Appeal in *Campbell* felt it unnecessary to consider whether the case before them was one of the exceptional cases recognised in *Hanlon v The Law Society* [1981] AC 124 in which resort may be had to subordinate legislation as an aid to construction of the parent Act of Parliament. The subsequent decision in *R(A) v Director of Establishments of Security Service* [2009] UKSC 12; [2010] 2 AC 1, *may* suggest (at paragraphs [40]-[41]) some support for Arden LJ's approach in circumstances where the relevant regulations are made close to the time of the passing of the parent Act and where the Act and regulations are enmeshed. However, *MS (Palestinian Territories) v SSHD* [2010] UKSC 25; [2010] 1 WLR 1639 at paragraph [36] arguably takes a contrary view and, perhaps instructively, cautions against using regulations to construe the meaning of the parent Act because to do so might cloud consideration of whether the regulations are *intra vires* the enabling power laid down in the Act. That concern, put another way, is to avoid in the exercise of statutory construction allowing the tail (the regulations) to wag the dog (the Act).

The primary legislation: section 12 of the Social Security Act 1998

42. Accordingly we start with the 1998 Act as amended and in particular with section 12(2) (especially (2)(b)), (3A) and (3B)). Section 12(2) lays down the general rule that the claimant "shall have a right of appeal to the First-tier Tribunal" in relation to the various categories of decision enumerated by section 12(1). We return later to the significance of this right in our discussion below of *R v Secretary of State for the Home Department ex parte Saleem* [2001] 1 WLR 443. As originally enacted, this right of appeal did not extend to certain types of prescribed decision, typically relating to what might be categorised as administrative, technical or purely discretionary decisions (see Schedule 2 to the 1998 Act and Schedule 2 to the 1999 Regulations). As a result of the amendments by the Welfare Reform Act 2012, it was further provided that "nothing in this subsection shall confer a right of appeal … (b) where regulations under subsection (3A) so provide" (section 12(2)(b) of the 1998 Act).

43. Section 12(3A) in turn empowers regulations to provide that the section 12(2) right of appeal arises "only if the Secretary of State has considered whether to revise the decision under section 9". The condition in section 12(3A) does not specify *how* the Secretary of State is to consider "whether to revise the decision under section 9". In argument, the Secretary of State placed emphasis on the emphatic conditional words "only if" in section 12(3A). However, we consider they do not inform what the "if" is. The key words in our judgement are those that define the condition precedent that the "only if" refers to, namely "the Secretary of State has considered whether to revise the decision under section 9". The introductory word "only" emphasises the need for that condition precedent to be satisfied but does not do more.

44. That then takes us to section 12(3B). This enables the regulations made under section 12(3A) to provide that that condition (i.e. the condition set out in section 12(3A) of having considered whether to revise the decision under section 9) is met only where certain criteria are fulfilled, such as that the consideration by the Secretary of State "was on an application" (section 12 (3B)(a)) and "satisfied any other condition specified in the regulations" (section 12(3B)(c)). Again, there is nothing there that expressly assists in understanding *how* the Secretary of State is to consider "whether to revise the decision under section 9" for the purposes of section 12(2). But it seems to us that it would be surprising if Parliament intended that the consideration of powers given to the Secretary of State relating to procedural conditions specified in such regulations and so a power to extend time would fall outside the consideration by the Secretary of State of the condition set by section 12(3A). This is because the conditions set by regulation and so the exercise of powers relating to them must relate to the exercise of the condition set by the primary legislation.

45. Thus we find nothing in the primary legislation which lends support to the proposition that the requirement in section 12(3A) should be construed as if it read that the section 12(2) right of appeal may be restricted by regulations to those cases that meet a narrower condition precedent (as modified by the

additional underlined phrase), namely "only if the Secretary of State has considered [on the basis of an in-time application for revision] whether to revise the decision under section 9". Section 9, of course, provides in part that the Secretary of State may revise an original decision made under section 8 "either within the prescribed period or in prescribed cases or circumstances" (section 9(1)(a)). This contemplates that the question of whether an original or an extended discretionary time limit is satisfied is itself part of the consideration of whether to effect a section 9 revision.

46. We now turn to consider the secondary legislation.

The secondary legislation: regulations 3, 3ZA and 4 of the 1999 Regulations

47. The relevant secondary legislation comprises regulations 3, 3ZA and 4 of the 1999 Regulations. We start with regulations 3 and 4 as these provisions formed part of the original architecture of the 1999 Regulations, before the amendments consequential upon the passage of the Welfare Reform Act 2012.

48. Regulation 3 makes a broad distinction between what is known as a revision on 'any ground' and an 'any time' revision. An application for an 'any ground' revision must be made within one month of the original section 8 decision or "within such longer period as may be allowed under regulation 4" (see regulation 3(1)(b) and 3(3)). An application for (or the Secretary of State's decision to effect) an 'any time' revision by definition may be made irrespective of any time constraints, but must be based on one of a number of carefully prescribed grounds (e.g. that the original decision "arose from an official error" – see regulation 3(5)(a)).

49. It therefore follows that regulation 4 – headed "late application for a revision" – can only have any relevance to an 'any ground' revision under regulation 3(1) or 3(3), as the opening words of regulation 4(1) in any event make plain. An 'any time' application for a revision can never be late so need never invoke regulation 4. The essential requirements of an application made under regulation 4 are that it gives details of the decision under challenge, contains

particulars of the grounds on which an extension is sought and falls within the overall 13 month time limit (on which see more below) – see regulation 4(3). Once made, the Secretary of State should only grant an extension of time if the three cumulative conditions in regulation 4(4) are made out, namely that (a) it is reasonable to do so, (b) the application has merit ("except in a case to which regulation 3ZA … applies") and (c) there are special circumstances which made it not practicable to make an in-time application.

50. At first sight the existence of the freestanding regulation 4 and its reference to "an application for an extension of time" (see regulation 4(2)) might be considered to lend support to the contention that there is a valid and determinative juridical distinction between (i) an application for a revision proper and (ii) an application for an extension of time to make an application for a revision. However, Mr Chamberlain's submission was **not** founded on this proposition and so an argument that until time had been extended there was no application for a revision. Rather, his submission was that the consideration of the two issues are conceptually entirely different.

51. We agree that a conclusion based on the proposition that until time has been extended there was no application for a revision would be based on an overly formalistic or linguistic approach to the 1999 Regulations that fits more readily with the making of an application under rules and procedure of a court or tribunal than with the nitty-gritty of benefits administration.

52. This may be further illustrated by analysis of regulation 3(1), the primary provision governing 'any ground' revisions. Two routes to effecting such a revision are contemplated. First, the Secretary of State of his own initiative may, as was the case before MR, revise within one month of the original decision (regulation 3(1)(a)). Second, a claimant may apply for such a revision (regulation 3(1)(b)). Accordingly, as regards the second possibility, the Secretary of State may revise the original decision (essentially for present purposes) if "an application for a revision is received … within one month of the date of notification of the original decision" (regulation 3(1)(b)(i)) or

"within such longer period as may be allowed under regulation 4" (regulation 3(1)(b)(iv)). The framing of the legislation is instructive. It gives the Secretary of State the power to revise where an application for a revision is made which happens to meet one of the various conditions set out in regulation 3(1)(b). This is quite different from saying that an application for a revision is only a valid application for a revision if it satisfies one of those time limits. The drafting of regulation 3(1), and in particular 3(1)(b), is premised on the understanding that there is a wide genus of applications for revision, but within which only certain species (those applications that are received by one of the various time limits specified in regulation 3(1)(b)(i)-(iv), including any permitted[1] extension of time under regulation 4) empower the Secretary of State to make a decision under section 9 revising an original section 8 decision. This reading of regulation 3(1) in our view lends support to the common ground before us that an application for a revision is not deprived of its character of being an application for revision simply by being late.

53. This then takes us to regulation 3ZA of the 1999 Regulations, inserted by regulation 4 of the Social Security, Child Support, Vaccine Damage and Other Payments (Decisions and Appeals) (Amendment) Regulations 2013 (SI 2013/2380) with effect from October 28, 2013. Paragraph (1) provides that regulation 3ZA applies where the Secretary of State has issued a notice of a decision under sections 8, 9 or 10 of the 1998 Act and that decision notice "includes a statement to the effect that there is a right of appeal in relation to the decision only if the Secretary of State has considered an application for a revision of the decision" (paragraph (1)(b)). Again, there is no hint that it must be an application for a revision that satisfies a time limit. Indeed, given the structure of regulation 3, that would be illogical – as a revision application may be made under regulation 3(5), which as an 'any time' application has no time limit.

[1] Although it was not the subject of any real argument before us and did not arise on the facts of either of the two cases, we consider that the maximum extension of time "as may be allowed under regulation 4", *per* regulation 3(1)(b)(iv) of the 1999 Regulations, may provide the basis for holding that a revision request made

54. The key provision in regulation 3ZA is paragraph (2), which reads as follows:

> "(2) In a case to which this regulation applies, a person has a right of appeal under section 12(2) of the Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of the Act."

So the claimant has a right of appeal where the MR requirement applies but only if the Secretary of State has considered "on an application" whether to revise the decision under section 9 of the Act. This stipulation of a need for an application is expressly envisaged by section 12(3B)(a). Given the drafting, "an application" must mean "on an application for a revision" as that term is understood in the context of paragraph (1).

The parties' submissions analysed

55. The central issue for determination is whether:

(a) as the Secretary of State contends, under the process set by the 1999 Regulations, he can only proceed to consider whether to revise the original decision under section 9 once he has (where it is necessary because the application is otherwise late) extended time under the 1999 Regulations, or

(b) as the claimants contend, that by considering whether the application is late and then refusing to extend time the Secretary of State has considered whether to revise the decisions under section 9, and decided not to do so on time grounds as part of the process set in place by the 1999 Regulations.

56. We repeat that it was accepted by the Secretary of State that he had received applications for revision from both claimants and that an application for revision that incorporates, or is accompanied by, an application for an extension of time is "an application" within regulation 3ZA(2). Furthermore, and in our view correctly, given our analysis above, it was not argued that as a

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after the maximum period of 13 months does not constitute an "application for revision" under regulations 3(1)(b) or 3ZA(2) of the 1999 Regulations, and so does not fall within s.12(3A) of the 1998 Act.

matter of strict language the 1999 Regulations as a whole distinguish between an application for a revision (see regulation 3(1)(b) and regulation 4(4)(b)) and an application for an extension of time (see regulation 4(2) and (4)) and that if time is not extended there is no application for a revision and so no application within regulation 3ZA(2). Rather, the Secretary of State's argument turned more narrowly on whether by considering and deciding not to extend time on the claimants' applications the Secretary of State has "considered whether to revise the decision under section 9" (within the meaning of both section 12(3A) and regulation 3ZA(2)).

57. The primary force of the linguistic argument in favour of the Secretary of State's position that the answer to that question is "no" involves three steps. First, any such consideration under section 9 must necessarily be governed by the legislation that determines the question of entitlement to the relevant benefit. Second, on any view, the test for extending time to make an application for revision is not governed by that legislation. Third, if the decision is based on a conclusion simply to refuse to extend time then it is not based on consideration of whether to revise the decision under section 9 because the decision maker has not had to address the relevant legislative test. The Secretary of State can also rely on the point that it would be odd if his refusal to accept an application made outside the 13 month time limit started time running for an appeal to the FTT.

58. The linguistic force of the claimants' argument that the answer is "yes" is that the legislative scheme set in place by the 1999 Regulations simply provides for the process of consideration "on an application" leading to a result, namely "whether to revise the decision under section 9". On that basis whatever route is taken to reaching a conclusion on that application leads to that result and so involves a consideration of whether or not to revise the decision under section 9.

59. In our view, reading section 12(3A) of the 1998 Act and regulation 3ZA(2) of the 1999 Regulations, both arguments are within the range of the relevant

language. However, in approaching this issue of statutory construction we must have proper regard to the four points mentioned in the formulation of the first issue at paragraph 18 above, namely (i) the scope of the enabling power; (ii) the principle of legality; (iii) common law fairness; and (iv) Article 6 of the ECHR and section 3 of the Human Rights Act 1998. We can summarise these considerations as (i) purpose, (ii) legality, (iii) fairness and (iv) access to justice. It is well established that they are all matters that fall to be taken into account in interpreting the language of legislation and so its effect. In our view this means that the answer to that issue of interpretation – does *considering whether to revise under section 9* include considering whether to extend time to apply for a revision? – is that advanced by the claimants, namely "yes".

60. It was argued by the Secretary of State in relation to the four questions of purpose, legality, fairness and access to justice that:

(a) the claimants had to show that the Secretary of State's interpretation of the 1998 Act and the 1999 Regulations was inherently unfair and that to do that they had to prove an inherent failure in the system itself. Thus proof of a systematic failure is not to be equated with a series of individual failures (see the approach in *R(S) v Director of Legal Aid Casework* [2016] EWCA Civ 464; [2016] 1 WLR 4733 in particular at paragraphs 15 to 17, applying earlier authority and in particular the high threshold identified by Dyson MR in *R (Detention Centre) v FTT(IAC)* [2015] EWCA Civ 840; [2015] 1 WLR 5341 at paragraph 27);

(b) a judge must take care that not to treat his individual criticisms as going to the legality of a statutory scheme (see *R(S) v Director of Legal Aid Casework* at paragraph 18);

(c) the claimants in the present proceedings have not established an evidential base for a conclusion of systematic unfairness;

(d) finally, in relation to ECHR Article 6, there is a wide ranging body of authority that judicial review can provide fair and adequate access to

a court to challenge administrative decisions points, including and equivalent to the application of time limits. In that context particular reliance was placed on the longstanding recognition that judicial review, rather than appeal, is the proper route for challenging a refusal to revise for official error under regulation 3(5)(a) of the 1999 Regulations, where there is no right of appeal (see the Tribunal of Social Security Commissioners' decision in *R(IS) 15/04*), and this should be applied by analogy.

61. We do not find these arguments persuasive. As regards points (a)-(c) in the previous paragraph, we accept that if "inherent unfairness" is the ground of challenge systematic failure would have to be proved and that is different to proof of a series of individual failures. However, the authorities on which the Secretary of State relies concern "inherent unfairness" as a ground of challenge rather than "fairness" as a factor that is relevant to an interpretation that identifies and promotes the underlying purpose of the statutory provisions and so, for example, is within the ambit of the rule making power. This important distinction means that the Secretary of State's submission that the test applied on a challenge based on inherent unfairness poses a substantial hurdle to the claimants' arguments insofar as it is based on the *Padfield* principle is flawed. That argument was primarily based on paragraph 18 of the judgment of Laws LJ in *R(S) v Director of Legal Aid Casework*. That passage was addressing the test of "inherent unfairness" as a ground of challenge in that case. In that context, Laws LJ says at paragraph 17:

> '17. The "irreducible minimum of fairness" must, of course, be judged against the background of the statutory context – here, LASPO s.10. I should note that the claimant has prayed in aid the seminal authority of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997: "[i]t has long been a basic principle of administrative law that a discretionary power must not be used to frustrate the object of the Act which conferred it". But the reference is, I think, apt to mislead. The appellants have not acted to promote an end or goal which is at odds with the statutory purpose (that would be the classic *Padfield* case). The reality of the claimant's argument is rather that the scheme does not measure up to s.10; and in that sense frustrates it. Upon that issue, *Padfield* carries the case no further. The need to judge the "irreducible minimum of fairness" against the background of LASPO s.10 is not a

> mandate of that authority; it is required by the ordinary need to have regard to context in the application of any legal rule.'

62. This passage identifies the important distinction we refer to in the previous paragraph and so the way in which purpose, legality and fairness are relied on by the claimants in the present proceedings in the context of the first issue as defined.

63. As regards point (d) in paragraph 60, we naturally accept that in a number of cases it has been held that the existence of judicial review satisfies the common law principles of fairness and of access to court and the requirements of Article 6 more generally. There are, however, two responses to this aspect of the Secretary of State's submissions. First, this does not mean that the availability of judicial review provides as good a remedy or route of challenge as an appeal to the FTT (see, for example, *Saleem* discussed below). Second, and in any event, context is everything – *R(IS) 15/04* is certainly authority for the proposition that the availability of judicial review as an alternative to a statutory appeal may be an adequate answer to an Article 6 challenge, but the circumstances were very different there. As the Tribunal of Commissioners made clear, the absence of a right of appeal against a refusal to revise did not breach Article 6 in that case as the claimant had the opportunity (i) to challenge the merits of the original decision before an independent tribunal (see paragraph [51]) and, failing that, (ii) to challenge the refusal to revise by way of judicial review in the event that the refusal occurred over 13 months after the original decision (see paragraph [54]). As we explore further below, the outcome for the present cases is very different if the Secretary of State is right in his submissions.

64. The scope and purpose of the enabling legislation is important and directs our primary attention to section 12(3A). As we have noted, the statutory language must be considered against the backdrop of purpose, legality, fairness and access to justice. There is inevitable and significant overlap between the impact of the common law principle of fairness and Article 6 of the ECHR and its impact on the application of section 3 of the Human Rights Act 1998 (see,

for example, in a different context Lord Reed in paragraphs 54 to 63 of his judgment in *R(Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, where he points out that the application and development of the common law in respect of the fundamental rights and freedoms guaranteed by the ECHR did not end with the passing of the HRA). Both the common law and Article 6 support the approach taken in the case law that clear language is needed to remove or interfere with existing rights of appeal (which may also go to legality: see *R (Witham) v Lord Chancellor* [1998] QB 575 at 586).

65. The need for clear language to remove or interfere with existing rights of appeal is founded on the nature of those rights and so the benefits they give to those affected by appealable decisions. An example of authority for the principle and its application to which we were taken is the Court of Appeal's decision in *Saleem.* The issue in *Saleem* was whether the right of appeal from an adjudicator conferred by section 20(1) of the Immigration Act 1971 had lawfully been cut down by time limits for exercising that right (which had been made under section 22 of the same Act and were found in rule 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996 (SI 1996/2070)). Mummery LJ said this (at 452H to 453D):

> "I agree that section 22 (1) (a) gives the Lord Chancellor power to make rules laying down time limits for appealing; setting procedures for the service of documents, including the determination of the adjudicator, by post on parties or their representatives; and putting upon parties the obligation to provide details of their address and to notify changes of address. Rules covering such topics may fairly and reasonably be regarded as regulating the exercise of the right of appeal.
>
> But the combined effect of rules 13 (2) and 42 (1) (a) of the 1996 Rules is a very different matter. By a process of deeming those rules produce a mandatory and irrefutable result that a party to whom a determination has been posted may irretrievably lose the right of appeal to the Appeal Tribunal "regardless of when or whether it was received". So the party is prevented from appealing, even if he can establish as a fact that, without fault on his part, he never actually received the determination; that it was accordingly impossible for him, for the purposes of section 20 (1), to be "dissatisfied with" the determination; and that it was impossible for him to exercise his right of appeal under that section.
>
> Rules which extinguish the right of appeal in such circumstances cannot fairly and reasonably be regarded as "regulating the exercise of the rights of appeal." The combined effect of these two rules in these circumstances is to remove the

> right of appeal conferred by section 20(1) rather than to regulate the exercise of that right in a manner consistent with the nature and extent of the right conferred. This result is outwith the rule making power conferred on the Lord Chancellor by section 22."

66. Earlier, giving the leading judgment, Roch LJ had said (at 449 E-F):

> "If it is correct that the section 20 right is a fundamental or basic right akin to the right of unimpeded access to a court, then there is this consequence that infringement of such a right must be either expressly authorised by Act of Parliament or arise by necessary implication from an Act of Parliament, see *Raymond v Honey* (1983) AC 1 in the speech of Lord Wilberforce at p.12H - 13C, a speech with which Lord Elwyn-Jones, Lord Russell and Lord Lowry agreed. Lord Bridge went further saying at page 14G:
>
> > ".....I would add a third principle, equally basic, that a citizen's right to unimpeded access to the courts can only be taken away by express enactment."'"

67. Turning to the argument that judicial review provided an alternative remedy available to an asylum seeker who was denied an appeal to the tribunal because she had not complied with a 5 day time limit, Roch LJ said:

> "I accept Mr Nicol's submission that the existence of these alternative remedies does not change the nature of rule 42(1)(a). These alternative remedies are not as effective as an appeal to the tribunal. The tribunal represents an independent review of the decision of the Secretary of State and of the special adjudicator. The tribunal has the power to make a determination which will secure for the asylum seeker asylum. The tribunal or special adjudicator on a reference under section 21 has no such power. Section 21 is intended to be in addition to an appeal to the tribunal are not in substitution for it.
>
> A fresh application will not assist the asylum seeker unless she can show a new claim which is sufficiently different from the original claim. In any event the asylum seeker may have a good claim for asylum based on her original claim. Finally, although an asylum seeker can apply for judicial review of the decisions of the Secretary of State or of a special adjudicator, the court will only quash a decision that is flawed on relatively narrow grounds."

68. Hale LJ (as she then was), in agreeing with both judgments and equally pertinently in the present context, rejected an argument by the Secretary of State that a distinction was to be drawn between the fundamental right of access to courts and access to tribunals (at page 457H to 458C):

> "I am quite unable to accept that argument. There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of dispute between private persons, tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. This was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993. In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.
>
> I also accept that the more fundamental the right interfered with, and the more drastic the interference, the more difficult it is to read a general rule or regulation making power as authorising that interference. Whether that is approached along the route of 'necessary implication' adopted in *Leech* or along the route of 'reasonable contemplation of Parliament' derived from *Kruse v Johnson* may not matter: the result will be the same."

69. Against this background we now turn to consider the issue of time limits more generally within the social security decision-making and appeals machinery.

Time limits generally in social security decision-making and appeals

70. We accept and record that claimants' entitlement to social security benefits can be made subject to them complying with time limits that can be extendable or non-extendable. This can apply both to the initial claim for benefit or a subsequent challenge to a decision on it. Accordingly, we accept as a matter of principle that exclusion from entitlement to a benefit based on the failure to comply with a time limit can be lawful. For example, in *Denson v Secretary of State for Work and Pensions* [2004] EWCA Civ 462 (reported as *R(CS) 4/04*) it was held that an absolute time limit for bringing appeals was not of itself incompatible with the ECHR although it may on occasion work injustice.

The time limits for an appeal to the First-tier Tribunal

71. The relevant rules are rules 5(3)(a) and 22 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685). Rule 22(2)(d) provides for a one month time limit (the precise date from which time runs depends on whether or not mandatory reconsideration applies). However, if the decision maker and any other parties do not object the appeal will be treated as being in time if it is made no later than 12 months after that time limit has expired (rule 22(8)(a)). If the decision maker and any other parties do object, the time limit can be extended (rule 5(3)(a)) but by no more than 12 months (rule 22(8)(b)).

72. The statutory scheme accordingly provides an outside or absolute time limit of 13 months. However, it has been held that in a really exceptional case, where an appellant "personally has done all he can to bring [the appeal] timeously", an appeal outside that time limit may be admitted if to fail to do so would result in a breach of that person's Convention rights (see *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818; [2013] 1 WLR 3156, see also *Pomiechowski v Poland* [2012] UKSC 20; [2012] 1 WLR 1604).

73. Such very exceptional cases aside, the power to extend for up to 12 months is given in general terms by rule 5(3)(a). Case law shows that a three stage approach should be adopted namely (i) assessing the seriousness and significance of the failure to comply with the time limit; (ii) considering why the default occurred; and (iii) evaluating all the circumstances of the case, so as to enable the tribunal to deal justly with the application (see *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286; [2016] 1 WLR 723). This "in all the circumstances" approach enables the FTT to assess the underlying merits of an appeal and to take them into account in determining whether or not to extend time. It also reflects the overriding objective set out in rule 2 and a result that is directed to achieve a correct decision that can be based on new material that, as the Secretary of State acknowledges, is often submitted on appeal.

<u>The time limits under the 1999 Regulations</u>

74. The 1999 Regulations also set an outside limit of 13 months for making a late application for a revision (regulation 4(3)(b)). We suggest that it is no accident that this outside time limit mirrors the 13 month time limit for appealing to the FTT. The extendable one month and related time limits set by regulation 3(1) likewise have a symmetry with the time limits for appealing to the FTT. The power to extend time is given in general terms but regulation 4 is not straightforward and is complicated by the distinctions it makes between Regulation 3ZA cases (and so the cases before us) and other cases.

75. In other cases (i.e. non-MR cases) a claimant seeking an extension of time has to show their application for revision has merit. However, the disapplication of regulation 4(4)(b) in a regulation 3ZA case means that the claimants in the present proceedings did not have to satisfy the Secretary of State that their applications for a revision had merit (although as events have shown they did). Rather, the claimants had to satisfy the Secretary of State and so an administrative decision-maker, that:

> (a) it was reasonable to grant an extension of time, and
> (b) ...
> (c) special circumstances are relevant to the application and as a result of them it was not practicable for application to be made within the extendable time limit.

76. How the approach to knowledge when considering "reasonableness" fits with the assessment of the existence of "special circumstances" that render it not practicable to bring the application in time is not clear and is for another day. But to succeed in obtaining an extension of time we agree with the Secretary of State that the "and" means that on a proper exercise of the power both limbs of the test must be satisfied. We did not hear or invite argument on whether, and if so how, the merits of the claimant's case on entitlement and amount should be taken into account in the application of the extension of time test under the 1999 Regulations. However, we comment that:

(a) if they are relevant and could be given significant weight it is difficult to see how under that test the claimants on the facts of their cases could obtain an extension, or more generally and

(b) returning to the broad purpose of the MR legislation as identified by him it is far from clear whether and if so how under that test for extending time the Secretary of State could have regard to "new material that is often submitted on an appeal" on the merits of the claim.

The impact on time limits if the Secretary of State is right

77. What then is being changed in respect of a claimant's right of appeal on entitlement to the FTT if the Secretary of State is correct in his submissions? The right is not removed or interfered with if a claimant complies with the regime of the 1999 Regulations (including its time limits), save in the sense that it is delayed by the imposition of the MR requirement. Of course, such delay can work to the advantage of the claimant if the Secretary of State revises the original decision and awards the benefit claimed without the need for an appeal - which clearly accords with the intention of Parliament. It also preserves the right of individuals to have their entitlement determined by the FTT, applying its approach to the time limits relevant to an appeal to the FTT.

78. So the interference with the right of appeal are the changes:

(a) to the time limits, from 13 months if there is no objection, and

(b) to the decision-maker on the extension of the initial and extendable time limit, and

(c) to the test for granting an extension of time.

79. If the Secretary of State is right:

(a) change (a) has a real impact, because the extension test does not permit the Secretary of State effectively to waive the extendable time limit because he recognises that the claimant is entitled or that the

appeal has merit and so enable him to replicate his practice of not taking a time point and supporting an appeal;

(b) change (b) has real impact because it means that the decision-maker in respect of the application for an extension of time is not an independent judicial authority, but an officer of the Department responsible for the original decision; and

(c) change (c) has real impact if it does not replicate the test applied by the FTT.

80. In our view, the intended or unintended consequence of the Secretary of State's stance is that it will result in a significant number of claimants who are entitled to benefits not being paid them because:

(a) they miss the time limit for a mandatory reconsideration, and

(b) either they do not judicially review that decision or their review fails because the decision is within the parameters of the test for an extension of time.

81. In contrast, in our view, the claimants' stance should promote the right decision on the entitlement to benefit being made as soon as possible because:

(a) if a mandatory reconsideration is refused on time grounds (that can or cannot be challenged on public law grounds) the Secretary of State will be able to consider the underlying merits if an appeal is brought and will continue his sensible practice to achieve the result that claimants get what they are entitled to by not opposing the appeal to the FTT, and

(b) an appeal to the FTT is much more user friendly and useful to a clamant because of its informality, the expertise of its members and its costs regime which clearly is not outweighed by the point that the appeal is not "in scope" for legal aid whereas judicial review is.

<u>The impact on appeal rights more generally if the Secretary of State is right</u>

82. This last point takes us to appeal rights more generally. If the Secretary of State is right then he:

(a) has both the first and (subject to judicial review of his decision under a time limit test) the last opportunity to consider the correctness of the decision when it is not revised on the basis of a time limit test, but

(b) only the first opportunity to do so if he refuses to revise the decision applying the provisions relating to the claimant's entitlement to the benefit, because then the claimant can appeal to the FTT.

83. The reality is that many claimants will be vulnerable for reasons including issues relating to their mental health or learning disabilities. It is obvious that there is a high risk that many of them with good claims on the merits will miss time limits. This risk has been exacerbated over recent years by changes in the scope of legal aid and local authority and advice sector provision and hence the reduction in the numbers of welfare rights officers and others who are readily available to assist claimants with their benefits claims and appeals.

84. Unless the Secretary of State can readily and regularly take the other courses that are open to him to review and replace original decisions that are wrong on the merits, and he did not suggest that he could, his answer to the interpretation issue will result in a significant number of vulnerable claimants not getting the benefits to which they are entitled.

85. The upside of his interpretation is that it limits the number of appeals to the FTT that do not have merit, but this advantage has no impact on the broad purpose identified by the Secretary of State and so an intention to ensure that claimants get their entitlement to benefit through correct decisions being made by him, rather than by the FTT (or on further appeal).

86. So, in our view, you do not need extensive monitoring or other empirical evidence to reach the views set out in the four preceding paragraphs. They

need not be and are not founded on evidence of systematic failure of the system of MR. Rather, they are founded on the nature of the issues, the likely reaction of individuals and the experience and expertise of members of the FTT and this Tribunal and so matters that have regard to the realities relating to persons claiming benefits rather than theoretical alternatives. Accordingly, in our view, they are consequences that Parliament would have been aware of when it introduced the MR system and so they are relevant to the intentions and purpose of Parliament in doing so.

87. Whilst it has not been a factor in our reasoning, we note that between October 2013 and February 2017 there were a total of 1,544,805 MR requests, of which an unknown number were refused on lateness grounds. In the same period the Secretary of State had received a grand total of 10 pre-action protocol letters threatening judicial review following a refusal to extend. The only one to proceed to a hearing was *CJ*, which was technically a challenge to the Secretary of State's approach to the interpretation of the regulations rather than a challenge to the decision to refuse to extend time.

Conclusion on the first issue of statutory interpretation

88. Returning to the introduction to this decision and applying the analysis set out above, we have concluded that the essential issue is whether the consequences of the Secretary of State's contention we have set out accord with the Parliamentary purpose he has identified, namely to enable the Secretary of State to have "the first opportunity to consider the correctness of the decision, including any new material which is often submitted on an appeal, and thereby prevent the need for the case to progress to appeal". We agree that this is a correct description of the statutory purpose that is supported by the Explanatory Notes to the Welfare Reform Act 2012. Returning to the primary legislation, the central issue can be posed by asking whether Parliament intended a claimant to be deprived of the right to a full merits appeal if the Secretary of State dealt with their application for MR by refusing to extend time under the 1999 Regulations.

89. We have concluded that the essential and driving Parliamentary purpose was to give the Secretary of State a second opportunity to get the decision on entitlement right, applying the statutory tests that govern it. The reference to "new material" reinforces this as does the underlying administrative justice goal that a public body responsible for paying out benefits should seek to ensure that claimants are paid the benefits to which they are entitled.

90. We acknowledge that, as with initial claims and appeals to the FTT, Parliament would have intended time limits being set for a revision of the original decision on the merits (a mandatory reconsideration) but in our view an intention to rule out a full merits appeal on the basis that an extension of time was not granted under the 1999 Regulations would frustrate the essential and driving purposes set out in the previous paragraph. To avoid this result we have concluded that on their true interpretation the MR regime under the 1998 Act and the 1999 Regulations is that any refusal to revise an application for MR made under the 1999 Regulations triggers the right to appeal to the FTT.

91. We acknowledge that different issues arise on the non-extendable 13 month period (which is mirrored by the FTT Rules). In our view, the likelihood of there being many cases in which a claimant applies near the end of that period or after it and so sets time running again after that length of time is small.

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

93. However, in our assessment of the overall statutory scheme we have considered whether our conclusion is undermined if an outside 13 month application is an application for revision. On that hypothesis we have decided that a conclusion that Parliament would not have intended that a claimant could start time for an appeal to the FTT running again by making such an

application for revision does not mean that applications made late but within the non-extendable 13 month period that are refused or not considered on the merits of the claim for benefit because time is not extended do not trigger a right of appeal.

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

Conclusion on the second issue of statutory interpretation

95. This does not arise. In our view, our approach to and conclusions relating to the first issue means that it is not appropriate for us to consider the second issue on the basis that we are wrong on the first.

Time for appealing and costs

96. Our conclusion has an impact on what may be a large number of appeals to the FTT and so there are good reasons for expediting any appeal of this decision to reduce the length of any stay of appeals to the FTT that are based on it.

97. If the order for costs of CJ's judicial review is not agreed we will deal with them after this decision has been promulgated in a manner set by directions when this decision is promulgated.

Our conclusion in summary

98. We are concerned with the situation where a claimant sends the Secretary of State a request for a mandatory reconsideration (a revision application) to which the Secretary of State responds by stating that the application is late and does not meet the criteria for extending time. We have concluded that as a

matter of statutory interpretation a claimant in such circumstances has a statutory right of appeal to the FTT.

Signed (on the original)

Mr Justice Charles
Chamber President

Nicholas Wikeley
Judge of the Upper Tribunal

Stewart Wright
Judge of the Upper Tribunal

Dated 3 August 2017

APPENDIX

CJ v Secretary of State for Work and Pensions – JR/3861/2016

1. The claimant, CJ, made a claim for ESA on 4 April 2013. Following a face to face assessment on 10 November 2015, the Secretary of State decided on 9 December 2015 that CJ was not entitled to ESA as she neither had, nor could be treated as having, limited capability for work.

2. Up to and including the date of the hearing before us we did not have sight of the original decision letters refusing benefit in either CJ's case or SG's case. We did, however, have put before us a standard refusal letter in a Disability Living Allowance case (not concerning either claimant), which it was suggested contains wording about mandatory reconsideration that was likely to be similar to that which appeared in CJ's and SG's letters refusing them entitlement to ESA. The material parts of this standard wording in the DLA letter read as follows:

> "**What to do if you think this decision is wrong**
>
> If you think the decision is wrong, please get in touch with us by telephone or in writing, **within one month of the date of this letter**. If you do not contact us within one month of the date of this letter we may only be able to change the decision from the date you contact us. Our telephone number and address are on the front page of this letter.
>
> You can appeal against this decision, but you cannot appeal until we have looked at the decision again. We call this a **Mandatory Reconsideration**."

3. Subsequent to the hearing we were provided with a copy of the actual decision letter of 9 December 2015 issued to CJ. It is eleven pages long. On the eleventh page is a section headed **What to do if you think this decision is wrong**. In all material respects this section in CJ's decision letter is identical to that quoted immediately above from the DLA decision letter. This part of CJ's letter ends:

> "When we have looked at the decision again, we will send you a letter explaining what we have done. We call this a Mandatory Reconsideration Notice. This will include the information you need to be able to appeal."

4. The time for seeking a revision of the 9 December 2015 decision before an appeal could be made, i.e. a mandatory reconsideration, was one month. CJ did not in fact make her mandatory reconsideration request until 13 May 2016, and so was over 5 months late. The reasons for the delay given were:

> "The request is late because [CJ] has had a series of hospital appointments to attend to and has to regularly visit her elderly mother to keep an eye as her health is failing. This meant she did not have time to seek advice and until seeking advice she had not realised that she was able to challenge [the decision]."

5. By a decision letter/Notice dated 26 July 2016 the Secretary of State, it is argued, declined to admit the mandatory reconsideration. In so far as the exact language used in the Notice of 26 July 2016 may matter, we set out what, instructively perhaps, the "**Your Mandatory Reconsideration Notice**" most relevantly said:

> "**Your Mandatory Reconsideration Notice**
>
> You or someone who has the authority to act for you, asked us to look again at the decision we sent on 09.12.16.
>
> We have taken into account all the information available.
>
> An explanation for our decision is set out below.
>
> **Employment and Support allowance (ESA)**
> **No Limited Capability for Work – Late Mandatory Reconsideration Request**
> **(Refused)**
>
> On 09-Dec-2015 we sent you a decision on your ESA claim.
>
> You have asked us to look at this decision again.
>
> If you want us to look at any decision again, you must contact us within one month of the date of your decision notification, unless there are special circumstances that mean you cannot do this within one month.

> As you did not ask us to look at your decision again until 21-Jun-2016 your application has been made late……
>
> We have considered your reasons for why your request is late and have decided that we cannot accept your request for us to look at your decision again.
>
> This is because more than 6 months have passed since [the original decision] was made.
>
> You cannot appeal against the decision not to accept your late request."

6. We consider it appropriate to make some observations about this Notice. First, it is headed "Your Mandatory Reconsideration Notice". Given that rule 22(2)(d) of the Tribunal Procedure (First—tier Tribunal) (Social Entitlement Chamber) Rules 2008 requires that an appellant "must start proceedings by sending or delivering a notice of appeal to the [First-tier Tribunal] so that it is received … if mandatory reconsideration applies, within 1 month after the date on which the appellant was sent notice of the result of mandatory reconsideration" (our underlining added for emphasis), such a heading is likely to lead claimants to understand that they have been "sent notice of the result of mandatory reconsideration". Second, the emphatic language used in this Notice about the one month time limit within which CJ should have sought mandatory reconsideration may be contrasted with the vaguer language used in the decision letter of 9 December 2015, where no clear warning is communicated about the need (on the Secretary of State's case) to apply for mandatory reconsideration within one month in order to secure rights of appeal against the decision. Third, "refusing" a request on the Secretary of State's case before us is arguably different to "not accepting" a request.

7. Despite the closing paragraph quoted in the Mandatory Reconsideration Notice set out in paragraph 5 above, CJ sought to appeal to the First-tier Tribunal with the assistance of a welfare rights officer in the Royal Borough of Greenwich. By a decision notice dated 7 September 2016 the FTT said that it appeared from the papers that CJ had not been through the mandatory reconsideration process as no Mandatory Reconsideration Notice had been

attached to the appeal. The tribunal stated that if the mandatory reconsideration request had been lodged late the Secretary of State had power to extend time, but there was no right of appeal to the FTT against a decision of the Secretary of State refusing to extend time to admit the late request.

8. CJ then had her case taken on by the Child Poverty Action Group ("CPAG"). CPAG made further representations to the FTT on CJ's behalf arguing, along lines essentially the same as the arguments now put before us, that the appeal was valid because the Secretary of State had considered whether to revise the decision that CJ was not entitled to ESA. At around the same time, and in the alternative, CPAG submitted a pre-action protocol letter to the Secretary of State threatening a judicial review in the High Court. The grounds challenged the lawfulness of the regulations made under section 12(3A) of the 1998 Act insofar as those regulations enabled the Secretary of State to prohibit CJ from appealing to the FTT against the entitlement decision of 9 December 2015 because he had concluded CJ's application for revision was late and was not to be admitted.

9. In his response to this pre-action letter, the Secretary of State notified CJ that the decision maker had agreed to reconsider his decision of 26 July 2016 not to admit the mandatory reconsideration request. On 14 October 2016, a Mandatory Reconsideration Notice was issued to CJ by the Secretary of State. This said, in terms of lateness: "Initially we did not accept your reasons for requesting a late mandatory reconsideration, however after some consideration; we are willing to accept lateness on this occasion". The Mandatory Reconsideration Notice upheld and did not revise the entitlement decision of 9 December 2015.

10. On 23 March 2017 the FTT allowed CJ's appeal against the Secretary of State's decision of 9 December 2015. That decision was set aside, with the tribunal deciding that CJ was entitled to ESA as she had limited capability for work. The FTT agreed with the Secretary of State's award of six points for activity 15 in Schedule 2 to the Employment and Support Allowance Regulations 2008

("the ESA Regs"), but also awarded CJ nine points for activity 1 in Schedule 2 (mobilising) and six points for activity 2 (standing and sitting). Unusually (in our experience) it recommended, though this was not part of its formal decision on the appeal, that in view of CJ's degree of disability, and unless the regulations changed, she should not be reassessed by the Secretary of State as to whether she continued to meet the Schedule 2 conditions for having limited capability for work.

SG v Secretary of State for Work and Pensions – CE/766/2016

11. SG was refused ESA in a decision dated 27 October 2014 on the basis that she did not have limited capability for work. SG made a late mandatory reconsideration request in a letter dated 26 August 2015. The late request was not accepted. This was communicated to SG in a letter from the respondent dated 21 October 2015. Unlike the Mandatory Reconsideration Notice provided to CJ, this letter was titled "**About your Mandatory Reconsideration**" and said, inter alia:

> "Having considered all the available evidence I am unable to accept your reasons for late application for a Mandatory Reconsideration because the available evidence indicates that you have been able to dispute your JSA claim and your mental health problem did not restrict you to dispute the decision. For these reasons I am unable to accept the reasons for your late request for a Mandatory Reconsideration.
>
> You cannot appeal against the decision not to accept the late request."

12. However, just like CJ, assisted here though by the Reading Community Welfare Rights Unit, SG did lodge an appeal with the FTT on 26 October 2015. A FTT judge decided on 12 November 2015 that:

> "This late application for [mandatory reconsideration] cannot be admitted [as an appeal]. As it has been refused by the DWP their decision can only be challenged by Judicial Review."

13. Like CJ, SG's case was then taken on by CPAG, and it submitted a pre-action protocol letter to the Secretary of State threatening a judicial review in the

High Court of the lawfulness of the regulations made under section 12(3A) of the 1998 Act. At the same time, CPAG applied to the FTT for permission to appeal to the Upper Tribunal against that tribunal's decision not to admit the appeal.

14. Serendipitously (or not) the threat of judicial review had the same result as in CJ's case. The respondent wrote to CPAG on 18 December 2015, through his complaints resolution manager, saying "I have looked at the points you have raised and have concluded that we can accept the request for Mandatory Reconsideration as a late request in this instance. The request has been passed to a Decision Maker….". The decision under appeal was then revised by a decision maker on 22 January 2016. The revised decision overturned the 27 October 2014 decision and found that SG did have limited capability for work and was entitled to ESA.

15. A month later, even though by then the point was academic in terms of SG's ability to challenge by way of appeal the non-entitlement decision of 27 October 2014, the FTT granted SG permission to appeal to the Upper Tribunal against its decision of 12 November 2015 not to admit her appeal. Leave to appeal was granted on the basis that "a refusal to carry out a mandatory reconsideration effectively removes the right of appeal without consideration of the merits".