

**Case Nos: CPC/384/2017
CPC/386/2017**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Before UPPER TRIBUNAL JUDGE FARBEY QC

DECISION

1. The appeal in **CPC/384/2017** is **dismissed**. The decision of the First-tier Tribunal sitting at Enfield on 4 October 2016 under appeal reference SC312/16/01453 did not involve the making of a material error of law. Therefore, its decision is not set aside.
2. The appeal in **CPC/386/2017** is **allowed**. The decision of the First-tier Tribunal sitting at Enfield on 4 October 2016 under appeal reference SC312/16/01452 involved the making of an error on a point of law and is set aside. The Upper Tribunal is not able to re-make the decision under appeal. The appeal is remitted to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out below.

REASONS FOR DECISION

Summary of what the appeal is about

1. In this appeal, the claimant challenges two decisions of the Secretary of State in relation to state pension credit (SPC). The first decision (taken on mandatory reconsideration on 1 July 2016) was that the claimant was not entitled to SPC from 9 October 2003. I shall call this the entitlement decision. The second decision (taken at the same time) was that he had been overpaid SPC from 9 October 2003 to 1 May 2016 in the sum of £33,227.13 of which £32,440.83 was recoverable. I shall call this the overpayment decision. Appeals against the entitlement decision (SC312/16/01453) and the overpayment decision (SC312/16/01452) were heard together by the First-tier Tribunal and dismissed. The claimant now appeals to the Upper Tribunal in relation to both decisions with the permission of Upper Tribunal Judge Markus QC.
2. The central issue raised by the claimant in both appeals is whether payments to his late wife from a personal pension set up by him should have been treated as part of his income for the purposes of assessing his entitlement to SPC. The Secretary of State resists the claimant's legal submissions. She nevertheless concedes the overpayment appeal on different, unrelated grounds to which I shall return below.

As the claimant's grounds of appeal raise a number of legal questions, I gave written directions on 16 June 2017 asking the parties to make further submissions and laying down a timetable for those submissions to be filed. Both parties have filed detailed arguments. I apologise for administrative delays in the Upper Tribunal which caused the timetable to slip. I have considered all the written submissions and material from both parties.

3. It is sad that, since the hearing before the First-tier Tribunal, the claimant's wife has died. The appeals relate to money which the claimant paid to her from his Standard Life pension. The couple separated in 1991. Under a written separation agreement drawn up by lawyers, the claimant undertook to make monthly maintenance payments to his wife. From 2001 he directed monthly payments to her from the pension. It is not in dispute that he did not tell the Secretary of State about this money.
4. In relation to the claimant's entitlement to SPC, the tribunal treated the pension money as being the claimant's income because it was money under his control. As it was income, the money fell to be included in the assessment of the claimant's entitlement to SPC with the result that he did not qualify. The claimant submits that money paid directly to his wife under the terms of a valid separation agreement does not amount to income under relevant statutory provisions.
5. In relation to the question of overpayment, the tribunal concluded that the claimant ought to have disclosed the pension payments as income; his failure to do so gave rise to recoverable overpayment. However, the Secretary of State has very fairly noted legal and factual mistakes in how the Department for Work and Pensions presented the overpayment case to the tribunal. I am therefore invited by the Secretary of State to dismiss the entitlement appeal but to allow the overpayment appeal to the extent that I should remit that appeal alone to the tribunal for fresh consideration.

Factual background

6. The claimant (who was born on 19 August 1941) started a pension plan with Standard Life in the 1970s. On 4 November 1991, he entered into a separation agreement with his wife in the form of a deed. Under the deed, he agreed to leave the matrimonial home. Ownership of the home was to be transferred from him to his wife. He agreed to pay his wife £1,000.00 per month in order that she could meet the mortgage repayments. The claimant duly vacated the home (which was transferred to his wife by way of a deed dated 12 February 1992) and commenced the monthly maintenance payments.
7. In 1994, the claimant retired from his job as a property investor. In 1996, he was made bankrupt and it was not until 2000 that the bankruptcy was discharged. On 28 May 1999, the Secretary of State awarded him minimum income guarantee.
8. On 18 August 2001 (which was the day before his sixtieth birthday), the claimant moved back into the matrimonial home although he and his wife continued to lead separate lives. On 19 August 2001, he 'drew down' his Standard Life pension

early (payments from the pension would otherwise have fallen due on his sixty-fifth birthday). The claimant's case is that the monthly payments were made by Standard Life to the claimant's wife as a way of meeting the claimant's obligation (at least in part) under the separation agreement. The claimant had been unable to make monthly payments between about 1994 and 2001 and so he also paid her a lump sum from the Standard Life pension towards arrears. He was unable to tell the tribunal the value of the lump sum.

9. By that time, the claimant was in receipt of income support. On 20 August 2001, he completed a Form A2 so that the Secretary of State could review his entitlement. The Form asked whether he or his partner was 'getting a pension'. In answer, the claimant ticked the box saying 'No'. He told the tribunal that he had 'no idea' why he answered in this way and that it was a mistake on his part.
10. On 6 October 2003, the claimant was transferred from income support to SPC on the basis of information previously supplied to the Secretary of State. On 12 September 2006, a DWP official visited the claimant's home to confirm that he and his wife were not living together. Records show that, during the course of the visit, the claimant said:

'I know from speaking to our daughters that my wife receives a low pension, I am not aware of any other income or if she has savings' (CPC/386/2017 page 65).

11. By 2016, the claimant had been sent a number of leaflets about SPC which he received but did not recall reading. At no time did he disclose the Standard Life pension which came to the Secretary of State's attention on 19 November 2015 as part of a data matching exercise with HMRC.
12. The Secretary of State took the entitlement and overpayment decisions on the basis that SPC had been awarded in ignorance of a material fact (CPC/386/2017 page 17) and that the claimant had 'misrepresented' on the income support review form 'that a non state pension from Standard Life was payable in respect of him' (CPC/386/2017 page 19). The Secretary of State's submission to the tribunal relied not on misrepresentation but on the contention that the claimant had failed to disclose the pension.

The tribunal's decision

13. The tribunal heard the claimant's appeals against both decisions on 4 October 2016. The claimant gave oral evidence. By a single decision notice issued on the same day, the tribunal dismissed the appeals and upheld the Secretary of State's decisions. A Statement of Reasons (SOR) was issued on 28 November 2016.
14. The tribunal accepted that none of the payments under the Standard Life pension was made to the claimant. It nevertheless took into account that the deed of separation did not specify how the monthly maintenance payments were to be made. The pension was not assigned to the claimant's wife but had remained in his name: he could have arranged at any time for the payments to be made to

himself. The tribunal found that no steps were taken to vary the terms of the deed of separation despite 'significant changes to what had previously been agreed' (SOR paragraph 13). In context, the reference to significant changes must refer to the claimant's return to the matrimonial home in 2001 and his inability to pay any maintenance between about 1994 and 2001. Given the significant changes, the tribunal regarded it as 'unlikely that the terms of the Deed remained enforceable' (SOR paragraph 13).

15. Against this background, the tribunal concluded that the claimant had at all material times been in possession of the pension income under relevant statutory provisions. That income rendered him ineligible for SPC. He had consequently been overpaid SPC in the sum of £33,227.13.
16. The tribunal went on to find that the overpayment was a consequence of the claimant's failure to disclose his pension income. The recoverable element was £32,440.83 representing the amount of SPC which the claimant had received before the Secretary of State became aware of the Standard Life pension on 19 November 2015.
17. The tribunal's conclusion that the claimant failed to disclose his pension income rested in part on its finding that he had been notified of his disclosure duties in departmental leaflets. The Secretary of State has drawn to my attention that the tribunal would have considered the duties on claimants set out in leaflet INF4(PC) 10/03 which was in the bundle but which concerns SPC and could not cover the claimant's time on income support. The leaflet relating to duties on income support claimants is called INF4(IS). That leaflet was not before the tribunal and has not been produced to me. The Secretary of State accepts that this lacuna in the evidence means that the tribunal decided the overpayment appeal in part on the wrong evidence. I shall return to the consequences of this error below but will turn now to consider the entitlement appeal.

The entitlement appeal

The relevant law

18. The principal question is whether the claimant's pension money counted as his income. Section 15(1) of the State Pension Credit Act 2002 contains a list of sources of income which are to be treated as 'income' for statutory purposes. The list includes 'retirement pension income' (at section 15(1)(c)). Retirement pension income is in turn defined so as to include income from an occupational or personal pension scheme (section 16(1)(f)).
19. Payments to third parties are governed by regulation 24(1) of the State Pension Credit Regulations 2002 which states:

'Any payment of income, other than a payment specified in paragraphs (2) or (3), to a third party in respect of the claimant shall be treated as possessed by the claimant'.

Paragraphs (2) and (3) contain exceptions which I need not consider.

20. Similar provisions have been considered in the context of other welfare benefits. The Scottish Commissioner's decision in R(IS) 4/01 considered the statutory scheme for income support. The claimant in that case had accepted a redundancy package which included a pension. He went on to set up a business of which his wife was an employee. He and his wife divorced. The business meanwhile failed and had to be wound up. The wife obtained judgment against him in respect of an industrial tribunal award and other debts which were owed to her. That judgment was enforced by way of a monthly sum deducted from the claimant's pension under an attachment of earnings order. The claimant's application for income support was disallowed on the basis that the pension fell to be taken into account in assessing his entitlement. His appeal to a social security appeal tribunal was dismissed on the basis that the pension belonged to him and that payments made under the attachment order formed part of his income.

21. Mr Commissioner Angus allowed the appeal from the tribunal. He held that in the absence of a definition of 'income' in either the relevant primary or secondary legislation, the word fell to be given its ordinary meaning. He stated (at paragraph 27):

'In my view in its ordinary sense "income" means money paid regularly to the recipient or to his order but not money which is paid and which he cannot prevent from being paid directly to a third party instead of to him'.

22. In that case, the portion of the pension paid to the wife could not in the ordinary sense of the word be said to be part of the claimant's income. The effect of the attachment order was that the pension 'was not being paid to him' and 'he could not demand payment to him' (paragraph 28). Money paid directly and mandatorily to a third party was not income.

23. The Commissioner went on to consider regulation 42(4)(a) of the Income Support (General) Regulations 1987 which stated (in so far as relevant) that any payment of pension income made to a third party 'in respect of' a claimant should be treated as 'possessed' by the claimant. He held at paragraph 30:

'Bearing in mind that the whole purpose of income support is the alimention of claimants who have no or inadequate sources of aliment it seems to me that payments made "in respect of" a claimant are limited to those payments which are made for the alimention of the claimant and which reduce or obviate the need for him to be alimented by the income support scheme. The payments being made out of the claimant's occupational pension...do nothing for the claimant's alimention, are not made in respect of him and, consequently, are not part of his income by virtue of regulation 42(4)'.

The claimant relies on the Commissioner's interpretation of the phrase 'in respect of' which appears also in regulation 24(1) of the State Pension Credit Regulations.

24. In *Leeves v Chief Adjudication Officer* (R(IS) 5/99), the Court of Appeal considered the case of a claimant for income support who was liable to repay his

local authority the balance of his student grant after he abandoned his studies. An Adjudication Officer decided that, even though the money fell to be repaid immediately, it counted as the claimant's income. The Court of Appeal accepted the claimant's submission that 'income', not being defined in the applicable income support regulations, should be given its 'natural and ordinary meaning.' It went on to decide that:

'where, at the date of a claim for income support, there is a certain and immediate...liability to repay money actually or notionally paid to the claimant, that money should not be regarded as income'.

The debt to the local authority should not on this test have been regarded as income. The approach in *Leeves* was followed by the Court of Appeal in *Morrell v Secretary of State for Work and Pensions* (R(IS) 6/03) where money which the claimant had received from her mother had the character of income in the absence of a certain and immediate obligation of repayment.

25. In *Chandler v Secretary of State for Work and Pensions* [2007] EWCA Civ 1211 [2008] 1 WLR 734, the Court of Appeal held that loan repayments made by an absent parent did not constitute income under the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 and should not have been taken into account in assessing liability for child support. The Court had been asked to consider a number of authorities relating to similarly-worded legislation in other parts of the social security system. In rejecting the utility of comparing provisions outside child support legislation, Jacob LJ held at [36]:

'I think there is considerable danger in jumping from one statute to another. It does not help. Each statute and its associated regulations fall to be construed as a whole. The context for construing a particular phrase or word is that statute, not some other statute'.

26. I directed the parties to CH/1672/2007 in which Mr Commissioner Williams considered similar provisions in the context of housing benefit legislation. The claimant in that case, aged over 60, had been ordered by the High Court to pay to his wife a monthly sum which was one half of the occupational retirement pension he received monthly. He made the payments as part of the arrangements associated with a decree absolute of judicial separation. When he claimed housing benefit, the local authority treated his income as being his full pension income and refused to take account of the sums paid to his wife. A social security appeal tribunal agreed with the local authority.
27. The relevant regulations were the Housing Benefit (Persons who have obtained the qualifying age for state pension credit) Regulations 2006 which defined 'income' as including retirement pension income. In turn, retirement pension income was defined by reference to section 16 of the State Pension Credit Act and so included income from an occupational pension scheme or personal pension scheme. Regulation 42(1) of the Housing Benefit Regulations required that any payment of income to a third party 'in respect of the claimant' should be treated as possessed by the claimant.

28. Having undertaken a review of relevant authorities, the Commissioner observed that it is the ‘immediate statutory context’ that will determine the meaning of statutory words (CH/1672/2007 paragraph 48). There is a ‘need to be cautious in taking some broad view of a term such as “income” at any generalised level that ignores the specific and detailed statutory framework within which it is used’ (paragraph 49). It is important to note ‘the precise financial transactions taking place’ (paragraph 48) and the specific factual context (paragraphs 51 and 56).
29. On the facts of that case, the mandatory nature of the High Court order meant that the sums paid to the claimant’s wife were not part of his income in any ordinary sense of the word. In reaching that conclusion, the Commissioner took into consideration (at paragraph 55) that the claimant had no practical power to treat them as his income.

Conclusions on the meaning of ‘income’

30. From these authorities, the following propositions may be derived. The term ‘income’ in sections 15 and 16 of the State Pension Credit Act 2002 should be given its natural and ordinary meaning. Any qualification of, or restriction on, the ordinary meaning may be justified only by reference to the particular statutory context. The meaning is not to be determined by reference to other welfare benefits in other legislative contexts. Case law relating to other benefits may not, therefore, provide the correct approach.
31. Income includes not only money paid to a recipient but also money paid to a person’s order or instruction. There is no principled reason to distinguish between money paid directly by A to C at B’s instruction and money paid by A to B which B then forwards to C. In each case, B is in control of the money and directs or chooses where it goes.
32. It will generally be useful to consider not only whether a claimant has taken possession of funds but also whether he has practical power to treat the funds as his income. Following *Leeves*, above, money which is subject to a certain and immediate obligation of repayment will not count as income.
33. Cases will be fact sensitive: the tribunal must consider all relevant evidence relating to the funds in question and the precise nature of the payment or transaction in question. If the tribunal has applied the meaning of income in its ordinary sense and based its decision on relevant evidence, its decision is not likely to be impugned by the Upper Tribunal whose jurisdiction is limited to errors of law. Applying this approach, I turn to the claimant’s submissions.

The claimant’s submissions

34. The claimant’s principal submission is that the pension money falls to be discounted because it is not income ‘in respect of the claimant’ under regulation 24(1) of the State Pension Credit Regulations which I have set out above. Relying on R(IS) 4/01, the claimant submits that social security legislation is concerned only with whether a claimant has sufficient income for his alimentation because only such income may reduce or obviate the need for him to be alimented by the

public purse. In so far as the claimant was bound to give the pension money to his wife, it could not have been deployed for his own alimentation. It should not therefore be regarded as reducing his need for welfare benefits and should not count in the assessment of income.

35. The claimant supports this principal submission with a number of secondary submissions which (it seems to me) fall into three strands. First, the claimant submits that the pension money was never possessed by the claimant: it was diverted at source to his wife. Secondly, he did not have practical control over the money: he was obliged to make payments to his wife under a valid separation agreement. Thirdly, it is contrary to public policy to treat money paid under a separation agreement as income: it would amount to treating those who settle out of court less advantageously than those who gain a certain and immediate liability under a court order (such as the claimants in R(IS) 4/01 and CH/1672/2007). I shall consider these three strands before I turn to regulation 24(1).

Possession

36. The claimant asks me to treat the pension money as money that was never possessed by or paid to the claimant. In the claimant's submission, only actual receipt amounts to possession. For that contention, the claimant relies on the decision of Mr Commissioner (now Upper Tribunal Judge) Mesher in CIS/5479/1997 in which he held at paragraph 11:

‘If a claimant who has not actually received income is to be treated as having that income, that has to be achieved by a specific provision in the legislation’.

37. In that case, an overpayment of an occupational pension was being recovered by the Italian authorities by withholding the amount of monthly payments of the pension, possibly at the claimant's request. In the present case, the facts are different. The claimant was free to deal with the pension money as he wished. It is not material that the money did not move across to, say, his bank account before it reached his wife because income includes not only money paid to a recipient but also money paid to a person's order. There is no doubt that Standard Life paid the pension money to the claimant's order. The pension money belonged to him.

Practical control

38. The claimant also retained practical control over the money. Nothing in the separation agreement compelled the claimant to deploy those pension funds to maintain his wife, as opposed to other sources of income. The pension funds were diverted to the claimant's wife only in so far as the claimant gave directions for that to happen and not because he could not have access to the money. The Secretary of State is correct to say that the claimant could have managed his maintenance obligation in other ways. He could have applied to a court to have the deed varied to reduce or remove his obligation. He could have sought to renegotiate the agreement with his wife. He could have sought to renegotiate the mortgage repayments. He may or may not have been successful in such endeavours. The point is that these sorts of steps, which were open to the claimant to take up, are indicators of having control over the money. These

various possible courses of action are open to those who control money and are not open to those who do not control money. They would not have been open to the claimants in R(IS) 4/01 or CH/1672/2007 because in each of those cases a court order ousted the claimant's control.

Public policy

39. In both R(IS) 4/01 and CH/1672/2007, it was the existence of a court order which persuaded the respective Commissioners to treat money as no longer being the claimant's own. The claimant in this case submits he should not be worse off because he entered into a separation agreement as opposed to launching court proceedings and obtaining a court order. He makes the point that modern Family Court practice is to encourage non-court dispute resolution. He submits that it would be contrary to public policy to treat a non-judicial separation agreement as inferior to a court order. I have some sympathy with the claimant's perspective. I agree that I should strive to avoid an interpretation of the word 'income' which is contrary to public policy.
40. However, there is more than one public policy at play. The social security system must not only promote fairness towards an individual claimant. It must also ensure fairness to the taxpayer and consistency between different social security claimants.
41. Fair and consistent decision-making means (as the Secretary of State submits) that a claimant should be deemed to make the most of any income to which he is entitled in order to meet his own needs before he meets obligations to other people. Otherwise, entitlement to means-tested benefits would depend on the different extent of obligations which different claimants might or might not decide to take upon themselves. It is the Secretary of State's function to operate the system for SPC. Fairness and consistency mean that he must operate the system untrammelled by the particular financial decisions and priorities of individuals.
42. Money paid under a court order is no longer subject to an individual's personal control and is not a matter of personal spending priority. There is no room for inconsistency between claimants because all those who are subject to court orders must obey them. It may therefore be reasonable to draw a bright line between an agreement out of court and a consent order which must be obeyed.
43. However, the tribunal did not rely on this sort of bright line and I do not think that it is necessary in this case to determine whether such a line is reasonable. The separation agreement in this case was a formal agreement drawn up by lawyers laying down obligations between the parties. It was intended to lay down obligations on the claimant to his wife. The Supreme Court has confirmed that nuptial agreements may govern legal relations between the parties subject to the court's overriding duty to prevent unfairness (*Granatino v Radmacher* [2010] UKSC 42; [2011] 1 AC 534). I have therefore considered whether the claimant should be deemed to have lost control of payments which he agreed to make under the deed. In light of the principles which I have set out above, the question of loss of control stands to be answered by reference to all the facts of the case.

44. What was the factual position here? As I have said, the tribunal found that the parties departed from the terms of the deed in significant ways. By 2001, the claimant had moved back into the matrimonial home. He did not have the resources to pay any maintenance to his wife between about 1994 and 2001. The claimant says that he used a lump sum from Standard Life to meet his arrears under the deed but could not tell the tribunal its value. In these circumstances, the status of the separation agreement when the claimant was awarded SPC in 2003 can only have been in doubt. The tribunal concluded that it was unlikely to have remained enforceable. Given its doubtful status and the unlikelihood that a court would enforce it, the tribunal is not open to criticism for regarding the pension money as the claimant's income. On the facts as found by the tribunal, the claimant's situation had moved on since he made the separation agreement. By the time he drew down the pension money, he was not under a certain and immediate obligation to pay that money to his wife.
45. In my view, the tribunal has applied the meaning of income in its ordinary sense and based its decision on relevant evidence, including the particular evidence about the separation agreement in this case. The decision that the claimant's pension money was his income reveals no material error of law.
46. The claimant raises a further argument of public policy which is that an interpretation which treats the pension money as being the claimant's income runs the risk of double counting: the same money could have been treated by the Secretary of State as belonging to both the claimant and his wife for the purpose of assessing their separate entitlements to means-tested benefits. Mr Commissioner Williams in CH/1672/2007 regarded double counting as militating against treating a sum of money as income (see paragraph 53). I do not regard any anomaly pinpointed by Mr Commissioner Williams as sufficiently potent to change my view of the statutory provisions in this case.
47. For these reasons, I conclude that the pension money amounted to income under section 15(1) of the State Pension Credit Act and turn to the effect of regulation 24(1).

Regulation 24(1)

48. The regulation's effect is that the claimant 'is deemed to possess income which is paid to a third party by someone in respect of the claimant' (Social Security Legislation 2017/18, Volume II, commentary at 4.94). I do not accept the claimant's submission that payments to third parties should be discounted from income unless they are deployed for the alimentation of the claimant. The claimant's pension payments went to the alimentation of his wife and not to his alimentation. However, the emphasis on alimentation in R(IS) 4/01 was the result of a close textual analysis of other, specific legislative provisions in the context of income support which are not mirrored in the SPC legislation. SPC is a separate benefit scheme. It is not helpful to 'jump' from one benefit to another (in the words of *Chandler*). I am concerned only with SPC.
49. In CH/1672/2007, Mr Commissioner Williams considered the similar provision of regulation 42(1) of the Housing Benefit (Persons who have obtained the

qualifying age for state pension credit) Regulations 2006 which required any payment of income to a third party ‘in respect of the claimant’ to be treated as possessed by the claimant. He held at paragraph 27 that a payment made by A to C ‘in respect of’ B means that the payment to C is for B’s purposes. I do not regard him as referring only to B’s alimentary purposes. In this case, Standard Life paid the claimant’s wife in lieu of the claimant; and the payments were treated as maintenance payments made by him. I do not regard the tribunal as having erred in law by concluding that, in these circumstances, Standard Life made the payments for the claimant’s purposes and so ‘in respect of’ the claimant.

50. For these reasons, despite the able submission of the claimant’s representative, the entitlement appeal is dismissed.

The overpayment appeal

51. I am able to deal with the overpayment appeal more briefly because the Secretary of State agrees that the tribunal’s decision must be set aside. The relevant statutory provision is section 71(1) of the Social Security Administration Act 1992 which provides:

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

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

[...],

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

52. The two statutory grounds for recovery of overpaid SPC are therefore misrepresentation and failure to disclose. As I have set out above, the Secretary of State’s decision in this case rested on misrepresentation but his submission to the tribunal was in terms of a failure to disclose the pension. The tribunal seems to recognise that the Secretary of State’s decision rested on misrepresentation (at SOR paragraph 1) but it went on to dismiss the appeal on grounds of failure to disclose. Neither the tribunal’s decision notice nor its SOR contain any analysis of section 71(1) and it is not clear whether the tribunal had in mind that the two limbs of section 71(1) are different and involve separate consideration of the evidence. In short, I take the view that the tribunal’s decision lacks clarity as to the legal basis on which the overpayment appeal was dismissed.

53. In the circumstances of this particular case, I am satisfied that the tribunal’s lack of clarity amounts to a material error of law. The error is compounded by the finding that the claimant was on numerous occasions informed in leaflets of his duty to tell the Secretary of State about the pension. In reaching that conclusion,

the tribunal seems to have relied on a leaflet about SPC, as I have mentioned above. The wording of that leaflet could not shed light on the claimant's obligations before he was migrated to SPC. The tribunal's decision did not turn decisively on this error but I am prepared to accept that it did have a material effect on the outcome which may have been different if the tribunal had appreciated the nature of the leaflet.

54. The claimant asks me to re-determine the appeal rather than to remit it. However I take the view that a further hearing is required for a new tribunal to make proper findings of fact.
55. The Secretary of State makes a number of other points for and against the claimant. I do not determine those points here because they will be for the tribunal to determine when it re-hears the appeal. While it is not appropriate for me to consider factual matters which are for the new tribunal, it seems to me that it is for the Secretary of State to produce the relevant leaflets and guidance which the claimant was expected to follow and I have below made directions for that to happen.
56. The fact that the overpayment appeal has succeeded on a point of law carries no implication as to the likely outcome of the rehearing, which is entirely a matter for the tribunal to which this case is remitted.
57. The tribunal will be concerned only with whether payment of SPC is recoverable. The Secretary of State's decision as to whether in the circumstances of this case the DWP should actually effect recovery and, if so, on what terms, is not a matter for the tribunal but is a matter of the Secretary of State's discretion. In making that decision, the Secretary of State will doubtless take into account all relevant circumstances including any compassionate features of the case.

DIRECTIONS

1. The tribunal must conduct a complete rehearing of the issues that are raised by the overpayment appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. While the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to those issues but must consider all aspects of the case, both fact and law, entirely afresh.
2. The tribunal must not take into account any circumstances that were not obtaining at the date of the decision under appeal – see section 12(8)(b) of the Social Security Act 1998. The tribunal may take into account evidence that came into existence after the decision was made and evidence of events after the decision was made, insofar as it is relevant to the circumstances obtaining at the date of decision: R(DLA) 2/01 and 3/01.

3. The Secretary of State must within six weeks of the date of the letter issuing this decision send to the First-tier Tribunal a revised submission on the overpayment appeal making clear the full legal and evidential basis of the overpayment decision. The submission must be supported by all documentary evidence on which the Secretary of State wishes to rely.

(Signed on the original)

JUDITH FARBEY QC
Judge of the Upper Tribunal
9 January 2018