EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY AND CHILD SUPPORT (SUPERSESSION OF APPEAL DECISIONS) REGULATIONS 2012

SI 2012 No. 1267

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

The purpose of these Regulations is to correct errors made by the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order (S.I. 2008/2683).**1** This instrument and section 103(1) of the Welfare Reform Act 2012 (supersession of decsions of former appeal bodies) – see Annex A, reinstate legislative powers to make decisions superseding decisions made by the social security appeal tribunals and the Child Support and Social Security Commissioners ("the former appeal bodies") before their functions transferred to the First-tier Tribunal and Upper Tribunals. This ensures that the legislation is restored to the position that it should have been on and after the transfer date.

3. Matters of special interest to the Joint Committee on Statutory Instruments

This instrument has retrospective effect. It has effect from 3rd November 2008, being the date on which the functions of the former appeal bodies transferred to the First-tier Tribunal and Upper Tribunal. Retrospective effect is permitted by section 103(2)(b) of the 2012 Act.

4. Legislative Context

In November 2008 the Ministry of Justice legislated to abolish the former appeal bodies and transferred their functions to the new appeals system: the First-tier Tribunal and the Upper Tribunal (*see* the Tribunals, Courts and Enforcement Act 2007 (c. 15))**2**. Whilst the legislation made to implement these reforms ensured that the Secretary of State, local authorities and the Child Maintenace and Enforcement Commission could supersede decisions made under the new appeals system, the need to supersede decisions made under the old system was inadvertently overlooked. This came to light as a result of a Social Security Commissioner's hearing into a housing benefit appeal in 2010. The legislation changed references to the former appeal bodies in primary and secondary legislation to references to the new appeal bodies, when it should have contained a reference to both.

1 http://www.legislation.gov.uk/uksi/2008/2683/contents/made
2 http://www.legislation.gov.uk/ukpga/2007/15/contents

5. Territorial Extent and Application

This instrument applies to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 In November 2008 the former social security appeal tribunals and the Child Support and the Social Security Commissioners were abolished and their functions transferred to the new First-tier Tribunal and Upper Tribunal administered by Her Majesty's Courts and Tribunals Service, as part of the implementation of the Tribunals, Courts and Enforcement Act 2007.

7.2 Before 2008, The Secretary of State, local authorities and the Child Maintenance and Enforcement Commission had clear powers to change (supersede) a decision of an appeal tribunal or a Commissioner in limited situations set out in legislation, most commonly where there has been a change in the claimant's circumstances since the tribunal's decision had effect. In social security cases, this is provided for in section 10 (decisions superseding earlier decisions) of the Social Security Act 1998 (c.14).

7.3 Amending legislation made in connection with the new appeals system ensured that the Secretary of State, local authorities and the Commission could change First-tier and Upper Tribunal decisions made under the new appeals system on the same basis as before. However, the need to ensure that decisions made under the former appeals system could continue to be changed was inadvertently overlooked. The gap in the legislation came to light as a result of a Social Security Commissioner's hearing into a housing benefit appeal in 2010 – see Annex B

7.4 Section 103 of the Welfare Reform Act 2012 and these Regulations will give a sound legislative basis for those superseding decisions which have been made since the former appeals bodies were abolished in November 2008. In relation to decisions made to date, we have taken the view that as the failure to retain legislative references to the former appeals bodies was an obvious drafting error, decision makers should adopt a corrective construction of the legislation. Superseding decisions, which may be advantageous to the claimant as well as disadvantageous, need to be made to reflect changes in the claimant's circumstances which had occurred since their tribunal's decision. Moreover, this approach ensures that claimants are treated alike, irrespective of whether the tribunal's decision is one made under the former or current appeals system.

Consolidation

7.5 There are no immediate plans to consolidate the Statutory Instruments which these Regulations amend. However, in due course, the Department will make available informal consolidated versions of the legislation, as amended, on its website. http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/

8. Consultation outcome

In so far as the Regulations concern housing and council tax decisions, the representatives of Local Authority Associations were content that formal consultation was not required. There has been no wider consultation in relation to this instrument on the basis that it corrects drafting errors and restores the legislation to the position it should have been – wider consultation would serve no purpose.

9. Guidance

No guidance will be issued. The purpose of the changes is to restore the legislation to its original intent. Accordingly new or updated guidance is not required.

10. Impact

10.1 There is no impact on business and civil society organisations.

10.2 The impact on the public sector is negligible.

10.3 A full impact assessment has not been published for this instrument.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring and review

There are no plans to monitor the changes. (In view of the context for these amendments as there are no practical implications there is nothing to monitor.)

13. Contact

Any queries regarding this instrument should be directed to the following:

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ANNEX A

SUPERSESSION OF DECISIONS OF FORMER APPELLATE BODIES

Section 103

"Schedule 12 contains amendments reinstating powers to make decisions superseding decisions made by appellate bodies before their functions were transferred to the First-tier Tribunal and Upper Tribunal.

The following have effect as if they had come into force on 3 November 2008—
(a) the amendments made by Schedule 12, and
(b) if regulations made in the exercise of the powers conferred by virtue of those amendments so provide, those regulations."

SCHEDULE 12

Child Support Act 1991

The Child Support Act 1991 is amended as follows.
(1)Section 17 (decisions superseding earlier decisions) is amended as follows.
(2)In subsection (1)—
(a)in paragraphs (b) and (d) after "any decision of" there is inserted "an appeal tribunal or";
(b)in paragraph (e) after "any decision of" there is inserted "a Child Support Commissioner or".
(3)After subsection (5) there is inserted—
"(6)In this section—

- "appeal tribunal" means an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998 (the functions of which have been transferred to the First-tier Tribunal);
- "Child Support Commissioner" means a person appointed as such under section 22 (the functions of whom have been transferred to the Upper Tribunal)."

(1)In Schedule 4C (departure directions), paragraph 2 is amended as follows.
(2)In sub-paragraph (1)(c), after "any decision of" there is inserted "an appeal tribunal or".
(3)In sub-paragraph (2), after "any decision of" (in each place) there is inserted "an appeal tribunal or".
(4)After sub-paragraph (2) there is inserted—

“(3)In this paragraph “appeal tribunal“ means an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998 (the functions of which have been transferred to the First-tier Tribunal).”

Social Security Act 1998

(1)Section 10 of the Social Security Act 1998 (decisions superseding earlier decisions) is amended as follows.
(2)In subsection (1), the “and” at the end of paragraph (a) is repealed and after that paragraph there is inserted—
“(aa)any decision under this Chapter of an appeal tribunal or a Commissioner; and”.

(3) After subsection (6) there is inserted—
“(7)In this section—

- “appeal tribunal” means an appeal tribunal constituted under Chapter 1 of this Part (the functions of which have been transferred to the First-tier Tribunal);
- “Commissioner” means a person appointed as a Social Security Commissioner under Schedule 4 (the functions of whom have been transferred to the Upper Tribunal), and includes a tribunal of such persons.”

Child Support, Pensions and Social Security Act 2000

(1)In Schedule 7 to the Child Support, Pensions and Social Security Act 2000 (housing benefit and council tax benefit), paragraph 4 (decisions superseding earlier decisions) is amended as follows.
(2)In sub-paragraph (1), the “and” at the end of paragraph (a) is repealed and after that paragraph there is inserted—
“(aa)any decision under this Schedule of an appeal tribunal or a Commissioner, and”.

(3)In sub-paragraph (2)—
(a)after “the decision appealed against to“ there is inserted “the tribunal or”;
(b)after “the decision being appealed against to” there is inserted “the Commissioner or”.
(4)After sub-paragraph (6) there is inserted—
“(7)In this paragraph—

- “appeal tribunal” means an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998 (the functions of which have been transferred to the First-tier Tribunal);

- “Commissioner” means a person appointed as a Social Security Commissioner under Schedule 4 to that Act (the functions of whom have been transferred to the Upper Tribunal), and includes a tribunal of such persons.”

ANNEX B

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the appellant.

The decision of the Leicester First-tier Tribunal dated 18 February 2009 under file reference 038/08/01539 involves an error on a point of law and is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the appellant's appeal against the Secretary of State's decision dated 11 March 2008 (as revised) is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The re-hearing will be at an oral hearing;

(2) The new tribunal should not involve the tribunal judge who heard this appeal at the hearing on 18 February 2009;

(3) The local authority needs to produce for the tribunal re-hearing a supplementary submission which sets out a clear chronology of the decision making process (see paragraph 53 below);

(4) The local authority's supplementary submission should expressly address the "Input slip", dated 12 March 2008, and how it fits into the decision making chronology. The local authority should also make it clear whether or not it is conceded that there was a disclosure of the payments in question on the December 2003 form and whether the failure to follow up that disclosure amounted to an official error;

(5) The tribunal should take into account the further guidance below (see paragraphs 46-40 in particular);

(6) The new tribunal must consider all the evidence afresh and is not bound in any way by the decision of the previous tribunal.

These directions are all subject to any later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary

1. The appellant's appeal to the Upper Tribunal is allowed. The decision of the Leicester First-tier Tribunal dated 18 February 2009 under file reference 038/08/01539 involves an error on a point of law and is set aside. There must be a re-hearing before a new First-tier Tribunal.

What the Upper Tribunal has decided in short

2. The right of appeal to the Upper Tribunal is only on points of law. The facts are for the First-tier Tribunal to decide. My decision is that the Leicester First-tier Tribunal applied the law wrongly. For that reason the appeal to the Upper Tribunal is allowed.

3. A new First-tier Tribunal must re-hear the appellant's appeal against the decisions of the local authority. That new tribunal must apply the law correctly and form its own view of the facts, in the light of the directions above and the guidance that follows. The fact that this appeal to the Upper Tribunal has succeeded on a point of law is no guarantee as to the outcome of the re-hearing before the First-tier Tribunal on the facts.

The parties' representatives and their submissions

4. The local authority's appeals officer and the appellant's representative, a welfare rights officer, employed by the same city council, have both put their points forcefully to the Upper Tribunal. There is no problem with that. However, at times both representatives appear almost to be pursuing a personal vendetta against each other.

5. For example, at one point the local authority's representative, certainly unhelpfully and arguably unfairly, referred to the submission by the appellant's representative as part of his "carefully laid web of entanglements and obfuscations", and to his "distractions" being a "smoke-screen" to disguise the appellant's alleged non-disclosure of certain payments he received. At another point, he complains of a "tired old argument" being advanced by the appellant's representative. The appellant's representative, in turn, referred to the local authority's "outrageous and outlandish claims" and later went so far to suggest that my reasons for an earlier direction suggested that the Upper Tribunal had "come to a decision on this point before the case has been properly considered". His further comment that the Upper Tribunal had decided to vacate a previously scheduled oral hearing "at the behest of the respondent" was at best uncalled for, given that in fact the respondent had changed its position in the meantime, and came perilously close to an allegation of bias.

6. These are legal proceedings and not a point scoring debating competition. As I am directing that the matter goes back for a re-hearing, I merely suggest that both representatives might care to take the opportunity to take stock and to lower the temperature of these proceedings. Some of the more acrimonious exchanges in these proceedings have generated more heat than light, which arguably do not help the appellant and certainly do not assist the tribunal in ensuring that the key issues are addressed.

The decisions under appeal to the First-tier Tribunal

7. The decision-making trail in this case is somewhat murky. However, on 11 March 2008 the local authority plainly decided that the appellant had been overpaid housing benefit and council tax benefit from 1 April 2005. They sent him a letter with detailed calculations to that effect, which was plainly an entitlement decision (Document no. 41, p.185, in the original tribunal bundle). It is a (presumably) computer-generated letter which is long on information and short on explanation. I have to say that the basis for the decision changing his past benefit entitlement is less than clear from that letter.

8. A clue, buried in the calculation sheets, was a reference to "private pension £6.76" (probably a misprint for £6.78). This presumably referred back to the housing benefit claim form completed by the claimant in January 2008, in which he declared that he had a "private pension paid by Scottish Equitable", worth £6.78 a week, and which had been in payment since "2003 approx… paid every August". Elsewhere on the same form he described it as a "private pension (annuity) of… £352.68 net on 1st of August each year".

9. On 11 March 2008 the local authority also sent a parallel letter (Document no. 42, p.221) stating that the total housing benefit overpayment was £199.09 and the total excess council tax benefit was £60.22. The period covered by the overpayment was said to be 1 April 2005 to 19 August 2007. This was presumably meant to be the overpayment recoverability decision letter. Again, however, the letter stated that the appellant's claim "has been revised", but with no further explanation as to why. I have to say that if I were the appellant, and I had received both letters three months after completing the claim form referred to in the previous paragraph, I would probably be at a loss to understand <u>why</u> the claim had been revised.

10. On 16 April 2008 the local authority sent a further letter (Document no. 43, p.221), described in its Schedule of Evidence as a "notification of finalised recoverable overpayment of housing benefit". This referred to an overpayment of housing benefit of £173.12, but with no explanation as to why it had been reduced from £199.09, even though it related to the same period. At least this letter explained that "an overpayment has occurred because you had an increase in your income". The appellant then lodged an appeal.

11. On 4 June 2008, after the appeal had been lodged, the local authority sent out new letters. The first letter, relating to housing benefit, stated that the appellant had been overpaid for the earlier period from 2 August 2003 until 24 October 2004 (Document no. 47.1, p.234). A second letter of the same date related to both housing benefit and council tax benefit; the housing benefit end date for this latter was 8 August 2004, and the amounts and periods were not identical to the first letter. This letter also referred to excess council tax benefit for the period 13 August 2003 to 24 October 2004. Other letters dated 4 June 2008 quantified the overpayments as amounting to £271.42 (housing benefit) and £65.64 (council tax benefit) (Document no. 48, p.262).

12. There was then yet another letter from the local authority, this time dated 11 June 2008 (Document no. 51, p.270). This itemised benefit entitlements for periods from 9 August 2004 to 10 December 2006. An accompanying letter declared the housing benefit

overpayment to be £21.81 and excess council tax benefit £7.06 but in relation to 25 October 2004 to 31 March 2005.

13. The local authority's appeals officer also wrote a more detailed letter of explanation to the appellant on 11 June 2008, which formed the basis of the local authority's case to the tribunal. This described the total housing benefit overpayment as £415.16 and the excess council tax benefit as £193.14. The housing benefit amount was reached by adding together the previously notified figures of £271.42 and £21.81 to make £293.23, and then reducing it to £242.04 because of a period on jobseeker's allowance, and then adding that revised figure to £173.12, so making a total of £415.16. The letter did not explain how the stated total council tax benefit excess figure of £193.14 had been arrived at, given that the previously notified amounts of £60.22, £65.64 and £7.06 amounted to just £132.92.

14. I have gone through this series of letters in some detail as I harbour serious doubts as to whether the local authority's original letters in March 2008, and indeed several of the subsequent letters, complied with the notification requirements set out in paragraph 15 of Schedule 9 to the Housing Benefit Regulations 2006 (SI 2006/213). In particular, it is by no means clear that they included a statement as to "the reason why there is a recoverable overpayment". However, ultimately I do not think that the appellant suffered has significant prejudice, given that by the end of the process the local authority had sought to explain the basis for its decision (see *Haringey LBC v Awaritefe* (1999) 32 HLR 517 and Commissioners' decisions R(H) 1/02 and CH/4943/2001).

15. The appellant's representative then submitted a detailed 7-page submission on his behalf to the First-tier Tribunal, which heard his appeal on 18 February 2009, challenging a number of points made by the local authority.

The First-tier Tribunal's decision

16. The First-tier Tribunal dismissed the appeal. The Decision Notice issued on the day stated that the decisions of 11 March 2008 in relation to both housing benefit and council tax benefit were confirmed and that there were recoverable overpayments of £173.12 and £242.04 (i.e. £415.16) in relation to the housing benefit decision and £60.22 and £72.70 (i.e. £132.92, and not £193.14) with regard to council tax benefit. Those amounts were also confirmed in the more detailed Statement of Reasons.

17. These particular amounts were, of course, not all included in the original letters of 11 March 2008. They were, however, based on the local authority's submission at the start of the tribunal bundle as to the contents of their various decisions (as presumably revised). They also seem to represent the local authority's revised position as set out in the letter from the appeals officer dated 11 June 2008 (subject to the query above about the correct amount of excess council tax benefit).

18. The nub of the First-tier Tribunal's decision was its finding that the overpayment "arose as a result of [the appellant] not giving notification of his income from a private pension. It is therefore not as a result of an official error and is therefore recoverable".

Why the First-tier Tribunal's decision involves at least one material error of law

19. The appellant's representative has submitted detailed grounds of appeal challenging the First-tier Tribunal's decision on various grounds. The original application for permission for appeal, which was granted by the District Tribunal Judge, itemised ten separate grounds of appeal.

20. I do not need to deal with each and every one of these grounds, and the parties' subsequent submissions on these and related issues, in great detail. The reason for that is I am satisfied that the very first ground of appeal is made out. This relates to the purported effect of the decision of the local authority and more especially the subsequent decision of the First-tier Tribunal on an earlier decision from 2005 of an appeal tribunal under the Social Security Act 1998. At this point a slight detour is required.

The earlier appeal tribunal decision of 5 January 2005

21. On 1 March 2004 the local authority had sent the appellant letters about his new benefit entitlements with respect to the rates applicable from the start of the new financial year in April 2004 (Document no. 5, p.33). On 1 October 2004 the local authority sent further letters stating that his benefit entitlement had been revised with effect from 10 May 2004 because of a change (to be precise an increase) in his income (Document no. 7, p.49). This prompted a further letter of 1 October 2004 stating that there was a recoverable overpayment of housing benefit of £152.46 and an excess payment of council tax benefit of £49.20 for the period from 10 May 2004 until 10 October 2004 (Document no. 8, p.57). The change in income referred to was an increase in the appellant's incapacity benefit. The appellant lodged an appeal.

22. On 5 January 2005 an appeal tribunal heard and dismissed the appeal. The local authority's decision dated 1 October 2004 was confirmed (Document no. 11, p.62). There is no Statement of Reasons for that tribunal's decision on file, presumably as none was requested. However, having read the letter of appeal and the local authority's submission to the earlier tribunal, I am satisfied that this was an appeal both on the issue of entitlement (i.e. how much housing benefit was he entitled to?) and recoverability (i.e. was any overpayment recoverable?).

23. Plainly, the local authority's decision of 11 March 2008, as revised on 11 June 2008, in other words the decisions now under appeal, purported to include the period covered by the decision of the 5 January 2005 appeal tribunal, as the periods concerned started back in August 2003. In his written submission, the appellant's representative argued that, in doing so, the local authority was revising a tribunal decision, which it had no power to do.

24. The First-tier Tribunal sought to deal with this challenge in two ways. First, it argued that the local authority had not revised a tribunal decision, as the earlier appeal tribunal's decision had simply confirmed the local authority's decision. Second, with an element of a bootstraps argument, it argued that in any event the earlier decision was about the impact on housing benefit entitlement of an undeclared increase in incapacity benefit; "it did not include the recovery of a further overpayment related to additional undeclared income". Therefore, the tribunal concluded, the local authority was entitled to revisit and reassess (to use somewhat neutral terms, rather than the statutory language of revision and supersession) the

appellant's entitlement to housing benefit and council tax benefit for the whole period, including that period covered by the 5 January 2005 appeal tribunal.

25. The appellant's representative attacks this reasoning whilst the local authority's representative seeks to sustain it. I prefer the arguments of the appellant's representative on this point for the following reasons.

26. The first reason advanced by the First-tier Tribunal discloses a plain error of law. As the Tribunal of Social Security Commissioners stated in decision R(I) 9/63, "Even if the appellate body affirms the original decision, that original decision retains its validity only by virtue of having been affirmed by the appellate decision and expressly or impliedly incorporated in it. The rights of those concerned are controlled by the appellate decision" (at paragraph 19). It is also clear that the legislative scheme simply makes no provision for a local authority or other first instance decision maker to revise the decision of an appeal tribunal or First-tier Tribunal (see paragraph 10(7) of decision R(IB) 2/04). In principle, however, such a decision may be subject to a supersession on the basis of a change in circumstances or a mistake of fact.

27. The second reason advanced by the First-tier Tribunal does not save its decision. True, the primary focus of the earlier appeal was the apparently undeclared increase in incapacity benefit and not any other type of payment received. However, on the face of it the 5 January 2005 appeal tribunal confirmed the appellant's overall entitlement to benefit for the relevant period and also the recoverability of the overpayment. The local authority argues that it would be absurd if an award confirmed by a tribunal decision could not be further changed if new facts were to come to light casting doubt on the true level of entitlement. That may well be right as a matter of general principle, but it does not affect the precise statutory proposition that the local authority had no standing to revise the decision of the 5 January 2005 appeal tribunal (see also paragraph 3 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000). The answer, if needed, and as indicated by the Tribunal of Social Security Commissioners (see paragraph 10(7) of decision R(IB) 2/04), lies in the supersession mechanism. The local authority argues that its approach was justified by regulations 7(2)(d) and 8(7) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002).

28. The starting point is in fact paragraph 4(1) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. Before November 3, 2008, this referred to decisions of an appeal tribunal or a (Social Security) Commissioner. However, since the amendments effective from November 3, 2008, this has provided as follows:

> "(1) Subject to sub-paragraphs (4) and (4A), the following, namely—
>
> (a) any relevant decision (whether as originally made or as revised under paragraph 3), and
>
> (b) any decision under this Schedule 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 appropriate relevant authority, either on an application made for the purpose by a person affected by the decision or on their own initiative."

29. Regulation 7(2)(d) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002), again as amended with effect from November 3, 2008, then enables local authorities to supersede a decision "of the First-tier Tribunal or of the Upper Tribunal" which "was made in ignorance of, or was based upon a mistake as to, some material fact". The effective date is then governed by regulation 8(7) of the 2001 Regulations, as amended, referring to a decision "superseding a decision of the First-tier Tribunal or of the Upper Tribunal". Before November 3, 2008, these provisions referred to decisions of appeal tribunals and Commissioners.

30. The difficulty with these provisions, at least from the local authority's point of view, is that since November 3, 2008 they have all referred to a decision that supersedes a "decision of the First-tier Tribunal or of the Upper Tribunal". They do not make express provision now for a decision superseding a decision of an appeal tribunal or a Commissioner, as they used to do before November 3, 2008.

31. The appellant's representative draws attention to the learned commentary in *CPAG's Housing Benefit and Council Tax Benefit Legislation* (22nd edition, 2009/10). This commentary observes (at p.146) that "the inadequate drafting of Sch 3 para 190 Transfer of Functions Order 2008 [a reference to SI 2008/2833] has, presumably inadvertently, removed the local authority's power to supersede a decision made by an appeal tribunal or a social security commissioner before 3 November 2008". Later, the commentary refers to this as "an astonishing drafting error" (p.987), not least as according to paragraph 11 of Schedule 7 to the 2000 Act, "Subject to the provisions of this Schedule, any decision made in accordance with the preceding provisions of this Schedule shall be final."

32. In the present case, the local authority's decisions under appeal and the appellant's appeal pre-dated November 3, 2008. To that extent, I conclude that even though in June 2008 the local authority could not revise the 2005 tribunal decision, it could in theory supersede that decision, using the machinery described above. However, given the absence of a Statement of Reasons for the decision of the 5 January 2005 appeal tribunal, it would, in my view, be extremely difficult for the local authority to discharge its burden of proof in showing a proper ground for any such supersession. Moreover, the First-tier Tribunal erred in law in this regard by failing to consider fully the potential grounds for supersession, namely change of circumstances or mistake of, or ignorance as to, some material fact.

33. The problems do not end there. Although the local authority's decisions pre-dated November 3, 2008, the First-tier Tribunal was sitting after that date, on February 18, 2009. I have therefore considered the transitional provisions in Schedule 4 to the Transfer of Functions Order 2008. However, whilst these ensure that certain proceedings which are already under way transfer over to the new scheme, I do not see how they can be read as providing for a power to supersede a past appeal tribunal decision in the circumstances of the present case. Moreover, as the commentary in CPAG's Housing Benefit and Council Tax Benefit Legislation *notes (at p.988), this problem has arisen previously in a different context (see the decision of Mr Commissioner Lloyd-Davies, as he then was, in CDLA/2999/2004,*

ruling that there was no valid decision capable of supersession following the change from mobility allowance to disability living allowance).

34. On that basis I accept that the first ground of appeal against the decision of the First-tier Tribunal dated 18 February 2009 is made out. The tribunal was not able to include as part of the recoverable overpayment the period from 10 May 2004 until 10 October 2004, as this period was covered by the decision of the 5 January 2005 appeal tribunal and its decision was final. It could not be revised by the local authority and the machinery for supersession did not survive the transition to the reformed tribunal structures on and after November 3, 2008.

The other grounds of appeal

35. I have already indicated that in these circumstances I do not need to deal with each and every one of the grounds of appeal, and the related submissions, in great detail. However, it is important to deal with what is probably the main ground of appeal advanced by the appellant's representative. Had I been satisfied that the erroneous inclusion of the overpayment for period from 10 May 2004 until 10 October 2004 was the only mistake by the tribunal, it would have been feasible for the Upper Tribunal simply to remake the decision to the same effect but without including the overpayment for that period.

36. The appellant's representative's main ground of appeal may be fairly summarised as follows. The representative argues that there was in fact an appropriate notification of the payments in question by the appellant and that any overpayment that arose thereafter was the result of official error and is not recoverable.

37. The First-tier Tribunal dealt with this point as follows. First, at paragraph 3 of its findings of fact, it noted that in two claim forms in late 2003 the appellant had ticked the "no" box to the question "do you have any money coming in which you have not already told us about on this form? This includes occupational pension". However, the tribunal found that "On the December 2003 form he stated that he was getting pension of £350 per year in answer to the question 'are you expecting to get any money in the next 12 months? What for?'", and that "no further notification was received in relation to this [money]". Second, at paragraph 12 of its findings of fact, the tribunal recorded, as noted above, that "the overpayment arose as a result of [the appellant] not giving notification of his income from a private pension. It is therefore not as a result of an official error and is therefore recoverable". Later, in the passage headed reasons, the tribunal again referred to the inclusion of this information in the December 2003 claim form.

38. It seems to me there is some force in the argument of the appellant's representative that the findings in the tribunal's decision are to some extent mutually contradictory – namely that he both did, and did not, notify the payments in question. More seriously, the tribunal failed to make sufficient findings of fact as to what precisely the appellant had disclosed in December 2003 and whether or not there had been any official error in that respect thereafter. There is a further element of confusion in this regard. In the passage headed reasons, the tribunal indicated why it felt that the appellant could reasonably have been expected to realise that he was being overpaid – but, of course, as a matter of law that question was irrelevant in the absence of a finding that there had indeed been some official error. In the circumstances, I find that the tribunal's treatment (in terms of fact-finding) of the December 2003 disclosure, and its failure to address the official error argument (in terms of reasoning) amounts to a further error of law, which warrants the decision of the First-tier Tribunal being set aside.

39. At this juncture I should also note a particularly disturbing aspect of these proceedings. The original bundle prepared by the local authority for the First-tier Tribunal was voluminous; it ran to 53 documents and 291 pages. The local authority's appeals officer wrote to the Tribunals Service stating that this was, to the best of her knowledge, "the whole record of [the appellant's] benefit history since November 2003".

40. The local authority's representative now acting in these proceedings has in his words "dug deeper into the factual basis for the decision-making and ... have found it insubstantial". I hear what he says about the pressures on frontline staff charged with delivering a highly complex benefit scheme in the face of heavy workloads and subject to demanding performance targets. However, as the local authority's representative also concedes, tribunals are entitled to expect that councils, just like any other party, will disclose all material evidence.

41. In the present case the local authority's representative has now produced a document called an "Input slip" dated 12 March 2008 (i.e. the day after the 11 March decision letters). The "Full Reasons for Decision" were stated to be as follows (with abbreviations explained and typographical errors corrected):

> "PRP [private pension] added on claim. I went through the claim and customer in 2003 app[lication] told us that PRP is received at around £350.00 PA. This was not followed up. I have added PRP from 02.08.2003 of £338.37 and then used £352.68 per annum from 02.08.2004 to date. This is because we are unaware of the actual amounts received in 2004/2005. 2006 and 2007 amounts are same @ 352.68. OP [overpayment] created and classified as LA error. Discussed with [colleague] who advised to carry out amendments as above."

42. This document was not produced for the First-tier Tribunal hearing. It is not clear why. It is difficult to see how it is other than a material piece of evidence, as it appears to be, on the face of it, a local authority concession that the omission to follow up the appellant's December 2003 statement was an official error, a point that the local authority has sought to contest throughout these proceedings. Of course, just because there has been an official error (if there has) does not mean, as a matter of law, that any subsequent overpayment of benefit

cannot be recovered by the local authority. However, this was plainly relevant evidence which should have been before the tribunal.

43. In his final submission the appellant's representative makes a more fundamental point about this "Input slip". He argues that as it is dated 12 March 2008 it amounts to a revision of the decision dated the day before 11 March 2008, but a decision which has not been properly notified to the appellant or indeed subsequently revised and properly notified. It is not clear whether this is necessarily right. I note that the "Input slip" states that "a new input slips [sic] completed as there was no effective date included in the previous slip". That might suggest that the "Input slip" is merely a replacement for one completed in respect of the decision letters issued with the previous day's date. If so, however, it does not explain why the 11 March letters stated the overpayments to be recoverable whereas the 12 March "input slip" implies that they were to be "written off" on the basis of official error. The appellant's representative points out that the effective date for the 12 March "input slip" is stated to be 1 April 2005, and not 2 August 2003, as finally determined by the First-tier Tribunal. However, this was presumably because as at both 11 and 12 March 2008 the effective date was thought by the local authority to be 1 April 2005 – it was only later, in June 2008, that the earlier date of August 2003 was selected in what appears to have been a further revision decision.

44. I should also note that the appellant's representative raises a number of other points about both the evidence that has been produced, both in terms of the papers that were actually before the tribunal and also the nature of the various questions on the different versions of the benefit claim and review forms. To take just one example: the bundle includes a housing benefit claim form signed by the appellant on 3 August 2003 (although not date-stamped by the authority until November 2003, for reasons which are unclear). The appellant has, on the face of it, ticked the "no" box to the question about any other money coming in, on Part 9 of that form. The December 2003 claim form, however, includes the information about his payment of £350 a year on the section headed Part 9 *continued* – but the corresponding page has been omitted from the November 2003 form. It may, or may not, have included material information – but given the history of this case, the next tribunal should see a copy of the entire form in each case and not simply the local authority's edited highlights.

45. For the reasons above I allow the appellant's appeal and set aside the decision of the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I have considered whether there was scope for the Upper Tribunal to re-make the decision itself. In my assessment this will require detailed fact-finding, which is best undertaken at the level of the First-tier Tribunal rather than at the Upper Tribunal. This would not be an appropriate or proportionate use of an oral hearing before the Upper Tribunal. The case must therefore be remitted for rehearing by a new First-tier Tribunal, subject to the directions above (section 12(2)(b)(i)). As well as bearing in mind the points above, the new tribunal may find the following observations helpful.

What is the nature of the payments in question?

46. The payments in question derived from a personal pension plan with Scottish Equitable, administered by Direct Pensions (Document no. 38, pp.150-152). The appellant was 65 in 2002. In July 2003 Direct Pensions wrote to him informing him that he was due a

tax-free lump sum and a first year annuity payment of £338.37. Subsequent payments were made annually on or about 5 August each year at the rate of £352.68 p.a. The notification also included the statement that the annual payments "are net of Basic rate Tax".

47. The appellant's representative's argument to the tribunal was that these were essentially one-off capital payments each year. He further argued that, as they were annuity payments, they were in fact capital payments, which although they may have been treated by the regulations as income, they were not conceptually income as such, and that this distinction was relevant to the questions posed on the various claim forms. He also contended that they should have been attributed solely to the week in which they were paid each year. The local authority's case all along was that these were in effect private pension payments, albeit paid annually, that they were income pure and simple, which were properly attributed across the year as a whole, and should have been disclosed at various junctures in the claim history.

48. The First-tier Tribunal adopted the same approach as the local authority and took the view that these payments were of an income and not a capital nature, referring to regulations 31 and 41 of the 2006 Regulations, and that they were properly attributed over a year as a whole (applying regulation 33).

49. The appellant's representative is, of course, correct to point out that regulation 41(2) of the 2006 Regulations provides that "any payment received under an annuity shall be treated as income". However, this does not in as many words mean that all annuity payments are inherently capital payments. Annuities come in all shapes and sizes. In particular, it is important to note that regulation 41 is headed "*Capital treated as income*". In other words, the purpose of regulation 41 is to provide for those payments which would normally be seen as capital to be treated as payments of income.

50. So the question then is whether these annuity payments are capital or income payments on first principles. The answer to that is clear. They were paid periodically, albeit once a year, and were subject to income tax. On that basis they must be income payments. It is significant that regulation 41(2) refers to "an annuity" generally; it makes no distinction, for example, between pension annuities and purchased life annuities. In my view regulation 41(2) is there to ensure that all annuity payments, whatever their complexion, end up being taken into account as income. The income tax system treats purchased life annuities as part capital and part income payments, so regulation 41(2) makes sure that the capital payment element under such an annuity is treated as income for benefit purposes. It does not somehow transform an ordinary pension annuity into a payment of capital which is then transformed back by a process of deeming into income. The argument of the appellant's representative also overlooks regulation 40 (headed "*Calculation of income other than earnings*"). Regulation 40(1) provides as follows:

> "(1) For the purposes of regulation 31 (average weekly income other than earnings), the income of a claimant which does not consist of earnings to be taken into account shall, subject to paragraphs (2) to (7) be his gross income and any capital treated as income under regulation 41 (capital treated as income)."

51. On that basis it is clear that whether the payments are income on first principles or capital treated as income, the effect is the same – they are income for the purposes of the attribution rule under regulation 31. In those circumstances I take the view that both the local authority and the tribunal were entitled to reach the view that the payments in question came into the equation as non-income earnings to be calculated in accordance with regulation 31. They would have been regarded as payments attributable to the whole year for tax purposes and I see no reason why the same approach should not also be taken for the purposes of calculating benefit entitlement. That was the appropriate period for the purposes of regulation 31.

52. This approach would also be consistent with that adopted in the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 (SI 1006/214), under which income from annuity contracts is clearly regarded as "income" (see regulation 29). Given the history of reforms both to the housing benefit scheme and to benefits for pensioners, it would be very odd if the regulations governing those claimants of working age (i.e. those now covered by the 2006 Regulations) treated such payments more generously than the parallel regulations now governing claims by those who have reached state pension credit age.

A possible way forward for the new tribunal

53. It will be evident from the above that I have considerable sympathy for the argument of the appellant's representative that there is "no coherent decision making process in this case". There is a large bundle of over 450 pages of evidence and competing submissions. At the very least the local authority needs to produce for the tribunal re-hearing a supplementary submission which sets out a clear chronology of the decision making process. Such a document needs to list each decision taken in relation to the appellant's benefit entitlement since at least the summer of 2003. It needs to show the date of that decision and whether it was a revision, or a supersession, of any earlier decision; both that earlier decision and the effective date of the decision needs to be made clear. The chronology should be cross-referenced to the evidence already on file in terms of decision letters etc.

54. If the local authority is unable to produce such a clear schedule, it will have to persuade the tribunal that the decisions taken on 11 June 2008 nonetheless constituted an effective revision both of the initial decisions taken on 11 March 2008 and of all previous decisions covering the material period and going back to whatever decision was in place as at 2 August 2003. That may be a significant evidential challenge for the local authority to surmount.

55. There have been hotly contested submissions and counter-submissions in the present appeal on the extent to which local authority decisions have been properly (a) made and (b) notified. I would observe simply that it is established law that even if a copy of the actual decision itself cannot be provided, it may be proved by extraneous evidence (see e.g. Commissioner's decision CH/216/2003). A Tribunal of Commissioners has confirmed that

defects in a revising or superseding decision do not necessarily render that decision invalid, although there may be some decisions "which have so little coherence or connection to legal powers that they do not amount to decisions under section 10 at all" (see decision R(IB) 2/04, at paragraph 72).

56. Unless the scheduled chronology of decisions suggests otherwise, the new tribunal should work on the basis that the appellant was appealing both the entitlement and recoverability decisions. However, in its submission to the new tribunal the local authority should expressly address the "Input slip" dated 12 March 2008 and how it fits into the decision making chronology. The local authority should also make it clear whether or not it is conceded that there was a disclosure of the payments in question on the December 2003 form and whether the failure to follow up that disclosure amounted to an official error.

57. If the local authority concedes that was an official error, or it does not concede that but the new tribunal finds that it was an official error, and/or that there was official error in the format of one or more of the various claim and review forms in use, then the tribunal will have to consider the other issues under regulation 100 of the 2006 regulations. In particular, if so, has the appellant shown that he could not reasonably have been expected to realise that there was an overpayment?

58. The new tribunal will also have to consider carefully the interaction in the sequence of local authority decisions and benefit claim and review forms completed by the appellant. This may raise some difficult issues both as to knowledge at particular times and as to causation. It is possible for example, even though there may have been an official error, that the substantial cause of any overpayment was something that the claimant either did or failed to do. This much is shown by the Court of Appeal's decision in *R on the application of Sier v Cambridge City Council* [2001] EWCA Civ 1523, although I have to say the facts of the present case appear to be some way removed from the flagrant non-disclosure in *Sier*.

59. The new tribunal must bear in mind that the local authority has no power to <u>revise</u> the decision of the January 2005 appeal tribunal. It must also bear in mind that, owing to the deficient drafting of the transitional provisions, there appears to be no power now to supersede that earlier tribunal decision. To that extent any decision taken now cannot interfere with the decision taken by the January 2005 appeal tribunal on the correct level of the appellant's benefit entitlement. Thus the local authority has no business now seeking to recover any further overpayment in respect of the period from 10 May 2004 until 10 October 2004.

60. I also just note in passing that in his letter of appeal against the 2004 entitlement and overpayment decisions, the appellant wrote that the local authority's "correspondence refers to revised benefit from 10/5/04 but I did not receive my extra income from that date but from August so this appears to be a mistake of yours". Of course, in the absence of any Statement of Reasons, it is difficult to know what the 2005 tribunal made of this point, which may actually be a reference to the annuity payments rather than the incapacity benefit increase in

issue then. This may raise yet one further aspect to the issue of potential official error which has not been explored to date.

Conclusion

61. For the reasons explained above, the decision of the tribunal involves an error of law. I must therefore allow the appeal and set aside the tribunal's decision, remitting the case for re-hearing. My decision is as set out above.

62. The fact that this appeal to the Upper Tribunal has succeeded should not be taken as any indication as to the final outcome of the re-hearing before the First-tier Tribunal.

Signed on the original
on 21 July 2010

Nicholas Wikeley
Judge of the Upper Tribunal