THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal in case CSDLA/375/2016 is refused. The decision of the First-tier Tribunal (Social Entitlement Chamber) given at Glasgow on 21 June 2016 did not involve a material error of law.

The appeal in case CSJSA/513/2016 is allowed. The decision of the First-tier Tribunal (Social Entitlement Chamber) given at Glasgow on 11 August 2016 involved a material error on a point of law and is set aside. The case is referred to the tribunal for rehearing before a differently constituted tribunal in accordance with the directions set out at the end of this decision.

REASONS FOR DECISIONS

Background and summary

1. When claimants disagree with decisions made by the Secretary of State for Work and Pensions ("**SSWP**") about benefits, they may ask the SSWP to reconsider her decision. The SSWP will ordinarily carry out a mandatory reconsideration, this being "an expression used by the Secretary of State to describe the process of reconsideration of an original decision on entitlement and amount of benefit" (*R(CJ) and SG v SSWP* [2018] AACR 5 paragraph 24). If a claimant is dissatisfied with the response of the SSWP to the request for mandatory reconsideration, then in some circumstances the First-tier Tribunal (the "**tribunal**") may have jurisdiction to hear an appeal. There are time limits for bringing appeals in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the "**Tribunal Rules**").

2. Since 2013, rights of appeal to the tribunal have been subject to a condition precedent that claimants should first have requested a mandatory reconsideration from the SSWP. The SSWP is given an opportunity to consider whether the original decision was correct, and in some cases this may avoid the need for an appeal (*R(CJ) and SG v SSWP* [2018] AACR 5) ("***CJ and SG"***) paragraphs 24 and 39-40). The policy underlying the change is easy to follow. The same cannot be said for the legal mechanisms adopted to effect the change. They give rise to a number of difficult questions about the time periods after the SSWP's original decision within which appellants must act in order to retain appeal rights to tribunals.

3. The case of *CJ and SG* decided that it was competent to bring an appeal to a tribunal when an application for mandatory reconsideration had been made within 13 months after the SSWP's original decision, even if the SSWP had

declined to consider the application. The cases before me consider the different question of whether a claimant may still appeal where a request for mandatory reconsideration was made more than 13 months after the SSWP's original decision. In summary:

3.1 Social security appeals to the tribunal are only competent if the tribunal has jurisdiction to hear them. Where a claimant has delayed requesting mandatory reconsideration for more than 13 months after the SSWP's original decision, in many cases the tribunal will have no jurisdiction to entertain an appeal. This follows from provisions in the Social Security Act 1998 (the "**1998 Act**") and the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the "**1999 Regulations**") which define the extent of the tribunal's jurisdiction. In "any ground" applications for mandatory reconsideration (for example those where the claimant's disagreement is simply that the SSWP got it wrong and there should have been a higher award) within Regulation 3(1) of the 1999 Regulations, and cases within Regulation 3(3), the tribunal will have no jurisdiction unless an application for mandatory reconsideration was submitted within 13 months of the original decision (subject to small extensions where statements of reasons have been requested). There are exceptions to this general position. A tribunal will have jurisdiction to hear an appeal even if the request for mandatory reconsideration has been made over 13 months after the original decision of the SSWP in cases where the substance of the mandatory reconsideration request falls within Regulation 3(5) of the 1999 Regulations. This covers cases where the ground for the mandatory reconsideration request is official error, as defined in Regulation 1 of the 1999 Regulations.

3.2 Even where there is jurisdiction to hear an appeal, limitation periods must be complied with. The right of appeal will only be exercisable if the appeal is brought within the time limits in the Tribunal Rules. In cases where mandatory reconsideration applies, in terms of the Rules this is within one month after the date on which the appellant was sent notice of the result of the mandatory reconsideration (which includes notice that the SSWP has declined to consider mandatory reconsideration (*CJ and SG*), extendable by the tribunal by a maximum period of 12 months (Rule 22 of the Tribunal Rules)).

3.3 These time limits may be extended only in very limited circumstances, under the principle in the case of *Adesina v Nursing and Midwifery Council* [2013] 1 WLR 3156 ("***Adesina***"). However, discretion to extend time limits will only arise in exceptional circumstances and where the appellant personally has done all they can to bring the appeal timeously. The *Adesina* principle is likely to have extremely limited application to extend time limits in the present context, given the length of the existing periods and the existing discretions to extend them.

4. Applying these principles to the present cases, the First-tier Tribunal did not have jurisdiction to hear the appeal in the case of CSDLA/375/2016 (PH). The request for mandatory reconsideration in PH's case was an "any ground"

application for revision falling within Regulation 3(1) of the 1999 Regulations, and so any application for mandatory reconsideration had to be brought within the time periods specified in Regulation 3(1). The original decision was on 28 February 2014 and the application for mandatory reconsideration was made on 24 August 2015, and was accordingly after the time limit in the 1999 Regulations. The circumstances of PH's case do not satisfy the conditions for application of an *Adesina* extension, even if *Adesina* applied. Because the tribunal lacked jurisdiction, the appeal should have been struck out under Rule 8(2) of the Tribunal Rules.

5. By contrast, the ground of application for mandatory reconsideration in CSJSA/513/2016 (SM) was expressly an allegation of official error. If official error was made out on the facts, then the tribunal would have had jurisdiction to determine the appeal on its merits, even though the original decision was on 24 November 2014 and the application for mandatory reconsideration was made on 21 January 2016. As the appeal was lodged with the tribunal over a month after the date on which the claimant was sent notice of the result of the mandatory reconsideration, the appeal could only proceed if the tribunal granted an extension of time under Rule 22(6) read with Rule 22(2). (The appeal was brought on 23 May 2016 but the outcome of the application for mandatory reconsideration had been notified on 16 February 2016). Parties were agreed that whether or not there was official error was a matter of fact for the tribunal. It is necessary to set aside the decision and remit to the tribunal to consider the following:
    1. Was there official error within the meaning of Regulation 3(5) (read with Regulation 1) of the 1999 Regulations? If the tribunal is not satisfied that there was such official error, it should strike out the appeal under Rule 8(2) for want of jurisdiction, unless it is satisfied that *Adesina* may apply to extend the time period in Regulation 3(1) of the 1999 Regulations (a matter still open for argument) and that the requirements for application of the *Adesina* principle are satisfied on the facts.
    2. If the tribunal finds it has jurisdiction, should the tribunal exercise its discretion to extend the one month period under Rule 22(6)? This will depend first on whether the SSWP objects, and if so, on whether the factors for an extension of time under Rule 5(3)(a) operate in favour of the claimant to excuse the delay of approximately 2 months beyond the initial 1 month period in Rule 22(2).
    3. If there is jurisdiction and the appeal is treated as timeous, should it be allowed on its merits?

6. I acknowledge that time limits can appear harsh to appellants who fall foul of them. However, time limits are a normal feature of legal systems, and arise because of wider considerations of justice. Where decisions are made by public bodies, it is recognised that the public interest in good administration requires that public authorities, third parties and others are not kept in suspense as to the legal validity of decisions for longer than necessary (*King v East Ayrshire Council* 1998 SC 182 p196). In social security appeals, the focus is on circumstances as they existed at the time of the SSWP's decision under appeal (Section 12(8)(b) of

the 1998 Act). Given the difficulty of looking back in time to determine cases once a considerable time has elapsed, and consequent adverse effects on justice, time limits operate to prevent stale cases proceeding. Time limits also operate to safeguard a system in which vulnerable claimants of subsistence benefits can apply to tribunals for decisions close in time to the original decision. There are three mitigating factors for benefit claimants adversely affected by time limits. First, new claims for the benefits in the appeals before me, disability living allowance ("**DLA**") or Jobseekers' Allowance ("**JSA**"), may be made at any time. This may not completely redress effects of adverse time barred decisions, because backdating of claims is limited (in general, no backdating of DLA to a date prior to a claim is permissible under Section 76(1) of the Social Security Contributions and Benefits Act 1992, and backdating of JSA claims is restricted to three months Social Security (Claims and Payments) Regulations 1987 Regulation 19(1) and (4)). Nevertheless, rights to these benefits are not lost for all time if an appeal against one particular decision is time barred. Second, there is a very limited ability in the tribunal to extend at least time limits under the Tribunal Rules in truly exceptional circumstances under the *Adesina* principle. Third, there is a residual right in any litigant to apply for judicial review. The Court of Session in Scotland possesses a supervisory jurisdiction and, in cases where there are exceptional circumstances, may exercise this jurisdiction, even where there was a potential alternative remedy (the statutory appeal) which has now been lost due to the lapse of time.

7. There are three issues which in my view are key to the determination of the cases before me; jurisdiction, limitation periods, and exceptional circumstances. Below, I deal with each in turn, and then consider the individual circumstances of each case before me. The legislative provisions referred to in this decision are lengthy, and so are set out in an Appendix to the decision.

Jurisdiction

8. In general terms, adjudicatory bodies are only entitled to decide cases before them if they have jurisdiction over them. Jurisdiction of the tribunal to hear DLA and JSA appeals is conferred by operation of two different statutes. First, Section 3(1) of the Tribunals, Courts and Enforcement Act 2007 (the "**2007 Act**") empowers the tribunal to exercise functions conferred on it by that Act or any other Act. Second, there is an "other Act" within the meaning of Section 3(1) of the 2007 Act which confers jurisdiction to hear JSA and DLA appeals in certain circumstances, namely the 1998 Act. Section 12 of the 1998 Act gives rights to claimants to appeal decisions made by the SSWP under Sections 8 and 10 of the 1998 Act (decisions by the SSWP on claims for benefit, including decisions superseding earlier decisions, including as revised under Section 9 of the 1998 Act). Section 8 of the 1998 Act entitles the SSWP to make decisions about DLA and JSA, by virtue of Section 8(3)(a) and Section 8(3)(b) respectively.

9. The tribunal's jurisdiction to hear appeals in DLA and JSA cases is circumscribed by the statutory provisions conferring it. With effect from 25 February 2013, there is jurisdiction only in cases in which claimants have made a relevant application

to the SSWP for mandatory reconsideration. The mechanism for this change was a regulation making power introduced into the statutory provision conferring jurisdiction on the First-tier tribunal (Section 12(3A) of the 1998 Act). This new sub-section conferred powers to make regulations to restrict the right of appeal to cases where the SSWP has considered whether to revise the decision under Section 9 of the 1998 Act. The amendment, and the Regulations made under it, do not mention the term "mandatory reconsideration", but use the language of revision. The term mandatory reconsideration is used in correspondence from the SSWP to describe the process, and also appears in the Tribunal Rules as described below. In the present cases, there is no dispute that the revision referred to in Section 12(3A) of the 1998 Act is a type of mandatory reconsideration as referred to in the Tribunal Rules and by the SSWP.

10. The provisions which were enacted under Section 12(3A) of the 1998 Act have the effect that the tribunal will only have jurisdiction to hear certain appeals where mandatory reconsideration applications were made to the SSWP within defined time periods. Where a claimant has been notified of a decision in a letter saying there is a right of appeal only if there has been an application for revision, then the appeal is restricted in that way (Regulation 3ZA of the 1999 Regulations). There are separate provisions on revision in Regulations 3(1), 3(3) and 3(5) of the same Regulations, the first two of which contain time limits for application for revision. Regulation 3(3) applications concern payments out of the social fund in respect of maternity or funeral expenses, with which these appeals are not directly concerned. Types of revision applications in point in the appeals before me are:

    10.1 "Any ground" revision applications (essentially those made on grounds other than those covered by Regulation 3(5)). These are subject to time limits in Regulations 3(1) and 3(3) of one month of the original SSWP decision (or 14 days after written reasons are given by the SSWP in certain cases), unless the SSWP allows an extension under Regulation 4. Extensions of time under Regulation 4 have to follow an application to the SSWP for extension, and are only granted on satisfaction of conditions (it is reasonable to grant the application, the application for revision has merit, and special circumstances exist as a result of which it was not practicable to make the application within the one month time limit). Importantly, it is provided that applications for Regulation 4 extensions shall:

    > "be made within 13 months of the date of notification of the decision which it is sought to have revised"

    (subject to an additional 14 day period in cases where reasons have been sought from the SSWP).

    10.2 "Any time" revisions under Regulation 3(5). Revisions falling within Regulation 3(5) may be made by the SSWP at any time. They are not subject to the time limits set out in Regulation 3(1) or 3(3) read with Regulation 4. But the types of cases falling within Regulation 3(5) are

carefully defined and limited categories, presumably to ensure only cases falling within those categories fall to be reconsidered by the SSWP at any time, rather than being subject to the Regulation 3(1) time limits. These categories include official error. (Other categories entitle the SSWP to revise decisions more advantageous to claimants than they should have been, due to mistake or ignorance of material fact). Official error is further defined in Regulation 1, and covers errors by officers of the DWP or designated authorities.

11. There is therefore a distinction between types of revision (as further explained in paragraph 52 of *CJ and SG*). What effect does this have on the extent of the tribunal's jurisdiction to hear appeals when mandatory reconsideration has been requested after 13 months? In *CJ and SG* a three judge panel noted in a footnote to paragraph 52:

> "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 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 Section 12(3A) of the 1998 Act".

The three judge panel therefore suggested that jurisdiction was circumscribed so tribunals did not have powers to hear appeals where applications for mandatory reconsideration had been made after 13 months. In my view, having had the benefit of submissions on the matter, this is correct insofar as it applies to Regulation 3(1)(b) and 3(3) "any ground" revisions, but "any time" revisions falling within Regulation 3(5) are in a different position. Not all types of application for revision after 13 months fall outside Regulation 3ZA(2). For example, applications for revision under Regulation 3(5) for official error made after 13 months seem to me to be applications for revision falling within Regulation 3ZA(2) and therefore satisfying the condition precedent for an appeal. Official error applications may be made at any time and are not subject to the provisions of Regulation 4, including as to content of applications. As a result, the precondition for the right of appeal under Section 12(3A), of having made an application for revision, would be satisfied in the case of an official error application under Regulation 3(5), even if such an application had been made after 13 months. I therefore suggest that the footnote to paragraph 52 in *CJ and SG* should instead read:

> "The maximum extension of time "as may be allowed under Regulation 4", mentioned in Regulation 3(1)(b)(iv) and 3(3) of the 1999 Regulations, means that an any ground revision request falling within Regulation 3(1) and 3(3) made after the maximum period of 13 months does not constitute "an application for revision" under Regulations 3(1)(b) or 3(3) of the 1999 Regulations. No jurisdiction is therefore conferred on the First-tier

> Tribunal to hear such an appeal, by operation of Section 12(3A) of the 1998 Act, because the SSWP has not considered whether to revise the decision under section 9 in terms of Regulation 3ZA(2) of the 1999 Regulations. However, the First-tier Tribunal might in principle have jurisdiction to hear an appeal following an application for revision made after 13 months, which has been made on the limited grounds listed in Regulation 3(5)".

12. The effect of this discussion is that First-tier Tribunals do not have jurisdiction to hear appeals where applications for mandatory reconsideration fall within Regulations 3(1) and 3(3) of the 1999 Regulations (any ground requests and requests about payments from the social fund in respect of maternity or funeral expenses) and they are late (ordinarily later than 13 months after the original decision of the SSWP, subject to small variations depending on the timing of written reasons). However, tribunals do have jurisdiction to hear appeals in cases where the mandatory reconsideration request is made after 13 months from the original decision in limited categories within Regulation 3(5), which include official error (as defined in Regulation 1). Accordingly, in cases where jurisdiction is in issue, First-tier Tribunals will have to consider whether a request for mandatory reconsideration is an "any ground" revision request (within Regulations 3(1) or 3(3) where jurisdictional time limits will apply) or an "any time" request (within Regulation 3(5). What is important is the substance of the request. The tribunal is not bound by parties' classification as "any ground" or "any time". Further, if an "any time" request advances no arguable case of official error and is spurious, there may be scope for the tribunal to find there has been no properly constituted "application to revise" for official error within the meaning of Regulation 3ZA of the 1999 Regulations, so there is no jurisdiction to hear an appeal, by application of Section 12(3A) of the 1998 Act (cp *Wood v SSWP* [2003] EWCA Civ 53). But in appropriate cases, tribunals will have jurisdiction to hear appeals, even if an application for mandatory reconsideration on the basis of official error was made more than 13 months after the original decision.

13. In reaching this decision I have taken account of *R (IS)*15/04 (a three Commissioner decision) which found, among other things, that there was no right of appeal where a decision refusing to revise for official error was made more than 13 months after the date of the original decision (and similarly *R(TC)* 1/05 at paragraph 14). The reason I have reached a different conclusion in official error cases is that the law has changed since those decisions were taken. Regulations 31 and 32 of the 1999 Regulations, which were relied upon in reaching the conclusions in those cases, were repealed in 2008, and new provisions introducing the condition precedent of mandatory reconsideration were introduced in 2013 in the 1998 Act, the 1999 Regulations and the Tribunal Rules. The effect of *CJ and SG* paragraph 90 is that in the new era of appeals being subject to a condition precedent of a mandatory reconsideration application, a refusal to revise on a timeous application for mandatory reconsideration made under the 1999 Regulations triggers the right to appeal to the tribunal. Since Regulation 3(5) of the 1999 Regulations does not contain

time limits, mandatory reconsideration applications based on official error made more than 13 months after the original decision are timeous. The new provisions in Rule 22 of the Tribunal Rules (discussed in the next section, and which are the eventual statutory successors of old Regulations 31 and 32) have the effect that the time period for bringing an appeal against an original decision after there has been a refusal to revise for official error commences on the date the claimant was sent notice of the result of mandatory reconsideration, and the claimant has one month from then to lodge the appeal, extendable up to a maximum of 13 months. Further, the commentary to Volume III of Sweet and Maxwell's Social Security Legislation 2018/19 paragraph 1.401 notes that no attempt was made in *R(IS)*15/04 to argue that Section 9(5) of the 1998 Act (concerning the time periods for appeals) should be read as including a refusal to revise (which would have the effect that the decision for the purpose of an appeal is regarded as made on the date of the refusal to revise, consistently with my interpretation of Rule 22 of the Tribunal Rules set out below). If that argument was made now, the reasoning in *CJ and SG* tends to suggest it would be accepted. This is consistent with the new approach to the commencement of the limitation period in Rule 22 of the Tribunal Rules.

14. I must explain why I have rejected the SSWP's position on jurisdiction. The SSWP suggested that because decision makers within the Department of Work and Pensions are guided to consider official error, whatever the content of the application for mandatory reconsideration, the tribunal had jurisdiction (although that jurisdiction could not be exercised due to the time limits in the Tribunal Rules). At the time of the refusal of the applications for revision in the two appeals before me, the SSWP operated a policy which has subsequently been set out in Memo DMG 17/17. The policy gave guidance to decision makers about how to deal with applications for mandatory reconsideration both within 13 months and after 13 months. Paragraph 2 of this policy reads:

> "Where the application is made late and the DM does not accept the reasons for lateness then the current guidance (DMG 03013) is to the effect that claimants have no right of appeal to the FtT and the claimant can only challenge the decision by means of Judicial Review".

Paragraph 7 of this policy reads:

> "If an application is made more than 13 months after notification of the original decision, DMs should consider whether the decision can be revised on the grounds of official error. If not, they should give a decision refusing to revise but this will not give a new right of appeal. DMs should consider whether the application for revision can be treated as an application for supersession".

15. I do not accept that, just because the SSWP chooses to consider official error in accordance with internal guidance, there is always jurisdiction to hear an appeal. A practice of the SSWP cannot change the effect of the statutory language analysed above. The drafters of the legislation set out detailed provision for the

circumstances in which any time revisions are possible in Regulation 3(5), and time limits only in Regulations 3(1) and 3(3), with the clear intention that these types of revision are distinct and subject to different rules. But the SSWP's submission in effect treats Regulation 3(1), 3(3) and 3(5) revisions in the same way for the purposes of jurisdiction, as if they were all official error revisions under Regulation 3(5), contrary to the legislative intention. The SSWP's submission was in danger of rendering the time limits in Regulations 3(1) and 3(3) redundant and otiose, although it was submitted the time limit could still have limited effect by saving the SSWP from having to consider "any ground" revisions in certain cases after 13 months, even if when the case came before the tribunal it could consider the whole case afresh. But it is difficult to see why the tribunal should then in principle be entitled to consider all grounds for revision, no matter how late the application is made, when the intention of Regulations 3(1) and 3(3) is that certain types of revision applications must be made within 13 months. In my view neither internal guidance nor decision making practice of the SSWP can change the meaning of the relevant legislative provisions, or metamorphose a particular mandatory reconsideration application into something it was not. I do not accept that there is inconsistency between the position I have reached and the legislative aim of the introduction of the requirement to consider mandatory reconsideration as a condition precedent to an appeal. The SSWP is still entitled to consider a request for mandatory reconsideration before any appeal. To the extent any existing appeal rights were removed by the changes in 2013, that was a direct consequence of the legislative intent that appeal rights be subject to a condition precedent of there having first been an application for mandatory reconsideration. In my view, the correct position is that if what is raised in the request for mandatory reconsideration application is in substance an allegation of official error (or other Regulation 3(5) ground), then the SSWP should treat the application as an "any time" application, and both the SSWP and the tribunal have jurisdiction to consider it even if made more than 13 months after the original decision. But if what is raised in the request for mandatory reconsideration application is in substance an "any ground" application, not falling within a Regulation 3(5) ground (for example a simple disagreement with a decision), that mandatory reconsideration application request is properly within Regulations 3(1) or 3(3), and subject to the general 13 month time limit. The tribunal will lack jurisdiction to hear appeals if the application for mandatory reconsideration was made over 13 months from the original decision. These types of appeals should be struck out under Rule 8(2) of the Tribunal Rules.

Limitation periods

16. Even in situations where an adjudicatory body has jurisdiction to decide a case, limitation periods may operate so that it is not possible for the appeal to proceed. As the SSWP puts it in the cases before me, the issues are whether a person (a) has and (b) may exercise a right of appeal to the First-tier Tribunal. Whether a person has a right of appeal to the tribunal at all is a question of jurisdiction; whether it may still be exercised is a question of limitation. It is therefore necessary to consider both concepts in these appeals.

17. As already mentioned above, the limitation period for bringing a claim before the tribunal is contained in Rule 22 of the Tribunal Rules. In cases where mandatory reconsideration applies, the Tribunal Rules provide that the case must be brought within 1 month of the date on which the appellant was sent notice of the result of mandatory reconsideration application (Rule 22(2)(d)(i)). Accordingly, where mandatory reconsideration applies, as the SSWP put it, the "clock restarts". The result is that in cases where there is jurisdiction, the limitation period begins not on the date of the SSWP's original decision, but on the date the appellant was sent notice of the result of mandatory reconsideration application. (The effect of *CJ and SG* is that this resetting of the clock covers notices about mandatory reconsideration application requested within 13 months of the original decision, both where revision has been considered but also where the SSWP has declined to consider the request at all as coming too late). This means that the time taken by the SSWP considering the application for mandatory reconsideration does not cut down the time period given by the Tribunal Rules to the claimant to bring their appeal. It is possible to request the tribunal for a discretionary extension of time beyond the 1 month period within which the appeal must be brought under Rule 5(3)(a), but under Rule 22(8) that extension is limited to 12 months. This gives an absolute limit of 13 months from the date the appellant was sent the result of mandatory reconsideration application. There are recognised principles to guide the exercise of discretion to extend time periods or not, discussed more fully at paragraph 5.215 of Volume III of Sweet and Maxwell's Social Security Legislation 2018/19. Time limits ought to be observed, so a three stage approach is applied to consideration of any extension: (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 of the circumstances of the case, so as to enable the tribunal to deal justly with the application.

18. In my view, in cases where a tribunal has jurisdiction to hear an appeal, the Tribunal Rules should be applied according to their normal and natural meaning. They set out a definition of mandatory reconsideration in Rule 22(9). Mandatory reconsideration (for the purposes of Rule 22(2)(d)) covers appeals against HMRC decisions, and situations where:

> "the notice of the decision being challenged includes a statement to the effect that there is a right of appeal in relation to the decision only if the decision-maker has considered an application for the revision, reversal, review or reconsideration (as the case may be) of the decision being challenged".

In the cases before me, mandatory reconsideration application did apply, because the notice of the decisions challenged included statements about mandatory reconsideration application within Rule 22(9) (PH p66, SM p5). So the relevant time limits are in Rule 22(2)(d)(i), subject to any extension in accordance with Rule 22(8) with 5(3)(a). The time period starts when the claimant is sent notice of the result of mandatory reconsideration and is one month, extendable to a maximum of 13 months. (There are also time limits in the

Tribunal Rules governing appeals where mandatory reconsideration application does not apply (Schedule 1), but they are not relevant to the cases before me).

19. Again I should explain why I have rejected the SSWP's argument, this time about the correct interpretation of the limitation periods in the Tribunal Rules. The SSWP argued not for a plain reading of the Tribunal Rules, but for either a restricted interpretation of "mandatory reconsideration" in Rule 22, or the reading in of additional words, to ensure appeals brought more than 13 months after the original decision were time barred. The submission was that "mandatory reconsideration" in the Rules had to be read as meaning consideration by the SSWP by a claimant for revision, which has been made and admitted under Regulation 3(1)(b) of the 1999 Regulations, or an original decision that has a statement under Regulation 3ZA(1)(b). Alternatively, additional wording had to be read in so that the words "mandatory reconsideration" in Rule 22(d) were qualified by "under Rule 3(1)(b) of the 1999 Regulations". It is understandable why the SSWP took this approach. The SSWP's stance on jurisdiction enabled claimants to resurrect appeal rights long after a decision had been taken, simply by requesting mandatory reconsideration on any basis. Faced with this potentially chaotic situation, the SSWP argued for an interpretation of the Tribunal Rules which would prevent this happening. I consider the SSWP's approach to be flawed. I accept that a situation where appeal rights may be manufactured by claimants many years after a decision has been taken, simply by requesting mandatory reconsideration, may be problematic. But the answer to this problem is by applying the statutory wording of the jurisdiction provisions. The jurisdictional time limits provide the necessary control to prevent many appeals proceeding long after the circumstances happened on which the decisions they appeal were based. It is true that in Regulation 3(5) situations such as official error, more generous time limits will apply, but that seems to me to be the clear intent of the 1999 Regulations for this limited category of cases. If there is no jurisdiction (for example where a Regulation 3(1) or 3(3) mandatory reconsideration application has been brought outwith the basic 13 month period), then the appeal should be struck out under Rule 8, and Rule 22 time limits do not fall to be applied.

20. There are other reasons why I am not prepared to accede to the SSWP's interpretation of the Tribunal Rules. First, the thrust of the SSWP's submissions was that the pre-2013 position on appeal rights, including in relation to official error, should continue. But it is generally accepted that effect should be given to wording in rules currently in force. If there has been an amendment, in the normal course that is because there was legislative intent to bring about a change. If sufficiently clear wording is used, then any presumptions that appeal rights should be unaffected are rebutted. The wording in the Tribunal Rules themselves is in my view clear enough for these purposes. Second, in the case of time limits, it seems to me particularly important to apply the words which are actually in force, because they govern whether an appeal right can be exercised or not. Legal certainty is a value recognised by the law. An approach such as that advocated by the SSWP, which requires delving into the history and giving the provisions a strained interpretation to retain the effect of the law prior to

amendment, rather than just applying the wording of the current rules, is the antithesis of legal certainty. Third, it is not self evident why a claimant should be subject to exactly the same time periods as before the amendment, consistently with the overall aim of introducing mandatory reconsideration. Mandatory reconsideration is likely to take the SSWP a certain amount of time; if there was no allowance for that additional time in the period allowed for bringing the appeal there seems a lack of even handedness. Particularly so, perhaps, in cases where the application for mandatory reconsideration is made near the end of the 13 month period in Regulations 3(1) and 3(3) of the 1999 Regulations and the SSWP takes time to decide it; it seems decidedly odd that whether there would or would not be a right of appeal against the outcome of the mandatory reconsideration would depend on whether the SSWP managed to determine it within the 13 month period or not. The SSWP suggested the *Adesina* principle could fill any gaps in this type of situation, but it is clear that is a very narrow principle with limited scope for application. I prefer an approach which simply applies the words actually used in the Tribunal Rules. The SSWP's argument that other purposes of the 1998 Act would be defeated if the Tribunal Rules were not given a restricted interpretation overlooks the controls on appeals exerted by the jurisdictional rules and in particular the time limits in Regulations 3(1) and 3(3) of the 1999 Regulations. Fourth, what the SSWP requested me to do seems to me to go beyond the judicial function. The written submission for the SSWP received on 10 October 2018 invited the Upper Tribunal to read Rule 22(2)(d) so that it means an application for revision made and admitted under Regulation 3(1)(b) of the 1999 Regulations. In oral submission, Regulation 3(3) was added, as it is also subject to the same jurisdictional time limits. But why then not Regulation 3(5)? And why then not the other categories which surrounded Regulation 3(1) in Schedule 1 paragraph (c) of the Tribunal Rules before amendment? It may be that it is considered undesirable for official error appeals to be capable of being considered so long after original decisions were made. Or it may be that substantial justice points to official error being capable of being remedied even after considerable periods of time, if it has kept claimants from entitlement they otherwise would have had (*LH v Secretary of State for Work and Pensions* [2014] UKUT 480 (AAC), [2015] AACR 14 and *DS v SSWP* [2018] UKUT 0270 (AAC)). The point is that there are choices about where the line should be drawn. In my view these choices are clearly for the legislator and not the judiciary.

21. Accordingly, in my view, if a tribunal has jurisdiction to hear an appeal even where an application for mandatory reconsideration is brought after 13 months (for example in official error cases), then an appeal is not time barred, provided it is brought within the time periods within Rule 22 (within one month of the date on which the appellant was sent notice of the result of mandatory reconsideration, or if an extension is successfully applied for, up to 13 months from that date). However, if the tribunal has no jurisdiction in the first place, the limitation periods in the Tribunal Rules will not fall to be applied at all. The appeal will have been struck out for want of jurisdiction under Rule 8(2).

Exceptional circumstances extensions of time under *Adesina*

22. In the case of *Adesina v Nursing and Midwifery Council* [2013] EWCA 818, it was recognised that, in order to comply with obligations under the Human Rights Act 1998 and rights of access to courts under Article 6 of the European Convention on Human Rights, courts have a limited discretion to extend time limits. The *Adesina* principle has been applied in the context of social security benefit appeals, in *KK v Sheffield County Council* (CTB) [2015] UKUT 367 AAC para 15. While I accept that tribunals have discretion to extend time periods if necessary to comply with Article 6, it is important to note the limitations of the *Adesina* principle. The discretion to extend time periods only arises where "the very essence" of a right of appeal conferred by statute is impaired, in exceptional circumstances and where the appellant has personally done all they can to bring the appeal within the prescribed time limit (*Adesina* paragraphs 14-15). As the Upper Tribunal said about the discretion to extend time at paragraph 15 of *KK v Sheffield Council*:

> "There have been a number of subsequent cases which have illustrated how sparingly the discretion should be exercised such as *Parkin v Nursing and Midwifery Council* [2014] EWHC 519 (Admin) and *Gyurkovits v General Dental Council* [2013] EWHC 4507 (Admin), but the discretion is there".

In the case of *Adesina* itself, nurses who were subject to serious adverse decisions of the Nursing and Midwifery Council were time barred from challenging those decisions because they missed a 28 day deadline in rules, compatibly with Article 6. In the present situation, there is a one month deadline for bringing an appeal to a tribunal, extendable up to 13 months, from the date the claimant has been sent notice of the result of the application for mandatory reconsideration (Rule 22(2)(d)(i) of the Tribunal Rules, subject to any extension in accordance with Rule 22(8) with 5(3)(a)). There is therefore already considerable scope for extensions under the Tribunal Rules way beyond the 28 day limit found compliant in *Adesina*. In my opinion the scope for further extensions under the application of the *Adesina* principle is very limited indeed.

23. At the oral hearing of this case, it appeared that a question might arise as to whether the *Adesina* principle could apply to extend time periods arising in the context of jurisdictional limits (in the 1999 Regulations), as well as limitation periods for bringing appeals (in the Tribunal Rules). Given that both sets of provisions in principle restrict rights of access to courts, I indicated that my provisional view was that *Adesina* could in principle apply to both, and invited submissions on the matter. I acceded to the SSWP's submission that if the issue proved necessary for the determination of the appeals before me, further written submissions would be invited, as the SSWP was not in a position to address me orally on the matter. In the event, it has not proved necessary to decide this question to determine these appeals in the Upper Tribunal. SM's case succeeds on other grounds. On the facts of PH's case, even if *Adesina* could in principle apply to jurisdictional time limits, the tests for giving a discretionary extension set out in *Adesina* are nowhere near being met.

The Claimants' cases

Participation

24. The cases were heard in oral hearings over one full day on 24 October 2018 and one half day on 8 November 2018. Prior to the oral hearings, parties had been given a number of different opportunities by earlier Upper Tribunal Judges to make written submissions. All written submissions provided were taken into account. At the oral hearings, the SSWP and SM were represented. PH elected to represent himself, although the representative for SM had passed on contact details to PH (SM bundle p220). SM was not himself at the hearing as he had returned to Poland. PH had received all papers in advance, but had not brought all of them to the oral hearing. PH was offered use of the Upper Tribunal's bundle, but in the event that was not necessary because the representatives for the other parties made available papers to PH at the hearing. All parties were agreed that the SSWP should address the Upper Tribunal first. SM and PH were able to hear the SSWP's argument on one day, and both were given the opportunity to respond at the continued second day over two weeks later, having had an opportunity to consider the submissions. SM lodged further written submissions to assist with the continued oral hearing. Frequent breaks in the hearings were taken to facilitate PH's participation. I am satisfied that all parties were available effectively to participate in the appeals before me.

PH's case

25. PH was born on 23 June 1957. He suffers from schizophrenia and spondylolisthesis. He appealed against a decision dated 28 February 2014 about his entitlement to DLA. The decision letter stated clearly that the claimant had been awarded the lower rate of the mobility component, and the middle rate of the care component. It was obvious on the face of the letter that the higher rate had not been awarded. The decision letter stated expressly on the third page that if PH thought the decision was wrong he should get in touch "**within one month of the date of this letter**" (bold text was used). The letter also stated that PH could appeal against the decision, but could not appeal until the SSWP had looked at the decision again, which the SSWP called a mandatory reconsideration (with the result that the case falls within Regulation 3ZA of the 1999 Regulations).

26. PH candidly told the Upper Tribunal that he had not realised that he might be able to get the higher rate of the mobility component of DLA until quite some time after this decision, when he was discussing matters with a disabled person. He then applied for mandatory reconsideration on 24 August 2015. That was almost 18 months after the original decision of the SSWP. His 3 page request for mandatory reconsideration appears at page 69-71 of the bundle. It requests mandatory review of the mobility component of the DLA award. I summarise the grounds in the request as follows. PH considered he may be entitled to the higher rate because of spondylolisthesis and mental health problems. PH indicated he had identified a suitable affordable vehicle for his needs and if he

should not be entitled to the higher rate of the mobility component, requested the DWP make a contribution to its cost. He considered that the vehicle would help him make regular visits to the swimming pool and gym which would in turn help improve his condition. When considering whether this was an "any ground" or "any time" request for mandatory reconsideration, in my view it is necessary to consider the substance of the ground on which reconsideration is sought. In my judgement, there is nothing in this request for mandatory reconsideration that can reasonably be read as based on 'official error' within the meaning of the definition of Regulation 1 of the 1999 Regulations. There is no allegation of any error by an officer of the Department of Work and Pensions. The grounds for reconsideration are simply that PH considered the decision was wrong on its merits. It was an "any ground" request for mandatory reconsideration falling within Regulation 3(1) of the 1999 Regulations.

27. The SSWP refused to reconsider because the request was made more than 13 months after the decision. An internal note not originally sent to PH but contained in the bundle stated:

> "Late application for revision received on 24/08/2015 not admitted as received outside the time limit. No grounds to revise the decision of 28/02/2014. No reason to supersede the decision on grounds of ignorance or mistake as to a material fact or change of circumstances or error of law".

The letter sent to PH by the SSWP refusing to admit the request for mandatory reconsideration was dated 13 October 2015. It explained that applications for reconsideration should normally be made within one calendar month. Late applications could be considered but only within 13 months of the day the decision was notified, or 13 months and 14 days if written reasons had been requested. As the request had not been received until 24 August 2015 it was outside these periods and would not be considered.

28. PH asked the SSWP to look at the matter again. The SSWP wrote to PH on 3 December 2015 reiterating that it had been decided that the decision dated 28 February 2014 could not be revised, with a further explanation having been given in the letter of 13 October 2015. The final sentence said, "If you wish to appeal to an independent tribunal please follow the attached instructions". The attached instructions stated PH could appeal to an independent tribunal, explained how to obtain information and an appeal form, and gave an address where the appeal could be sent.

29. PH wrote to HMCTS on 30 December 2015 giving notice of intention to appeal and requesting further time to obtain documentation. The appeal was received on 6 January 2015. The basis of the appeal was that because of exceptional circumstances the SSWP should have reconsidered his case. The First-tier Tribunal confirmed the decision of the SSWP of 13 October 2015 and disallowed the appeal. Reasons were given refusing to extend time limits. PH appealed the decision of the tribunal. His grounds of appeal to the Upper Tribunal were not

found to disclose an arguable error of law, but permission to appeal to the Upper Tribunal was granted because of concerns about whether the tribunal had properly applied Rule 31 of the Tribunal Rules (an issue which fell away because PH had been present at the hearing before the tribunal) but also whether the tribunal had properly found that the claimant had made his application to the tribunal too late. In further directions of 9 December 2016 the Upper Tribunal Judge confirmed that the issue in the appeal was essentially one of jurisdiction of the tribunal to determine an appeal where there has been no mandatory reconsideration, the request for mandatory reconsideration having been made late and accordingly rejected. The case was then sisted pending the decision of a three judge panel in *CJ and SG*. This case ultimately did not determine the issue raised in *PH*'s case, because it covered only the situation in which the application for mandatory reconsideration had been made within 13 months of the original decision, whereas in this case it had been made almost 18 months after the original decision. In the oral hearing before me, PH's position was that in his case there was official error, or exceptional circumstances, or both, and accordingly his appeal should be heard.

30. *Official error.* I have already indicated above (paragraphs 14-15) why I do not accept the SSWP's concession that there is jurisdiction based on official error. There was no request for mandatory reconsideration in PH's case which was based on official error. The SSWP's internal practices cannot confer on the tribunal a jurisdiction which it is not given by statute. PH also argued that there were other aspects of the case giving rise to official error, with the result that his case should be allowed to proceed. He had received the letter from the SSWP dated 3 December 2015 saying he had a right of appeal, and if he did not have a right of appeal there was official error on the part of SSWP. His argument was that this was sufficient for his appeal to be heard. This argument was misconceived. It is true that, as decided in relation to SM's case below, a request for mandatory reconsideration based on an official error under Regulation 3(5)(a) is not subject to the general 13 month jurisdictional limit contained in Regulations 3(1) and 3(3) of the 1999 Regulations. But Regulation 3(5) of the 1999 Regulations in its terms is concerned with decisions of the SSWP under section 8 or 10 (which are essentially about entitlement to benefits, not whether the SSWP should revise a decision). In this case the relevant section 8 (or 10) decision about entitlement was the decision dated 28 February 2014. In paragraph 26 above I have already found that PH's request for mandatory reconsideration of that decision of 28 February 2014 was not based on official error within the meaning of Regulation 3(5)(a) read with Regulation 1 of the 1999 Regulations. It was a simple disagreement with the decision. Because it was an "any ground' application for revision within Regulation 3(1) of the 1999 Regulations, it was subject to the 13 month jurisdictional time limit. Since the request for mandatory reconsideration was made almost 18 months after the original decision, it was too late. On application of the principles in the recast footnote to paragraph 52 in *CJ and SG*, the mandatory reconsideration was made after the maximum period of 13 months from the date of the decision, so it did not constitute an application for revision within the meaning of the 1999 Regulations. The tribunal has no jurisdiction to hear the appeal, by operation of

Section 12(3A) of the 1998 Act, because the SSWP has not considered whether to revise the decision under Section 9 in terms of Regulation 3ZA(2) of the 1999 Regulations. I reject the submission of PH that there was a statutory right of appeal because of paragraph 98 of *CJ and SG*. Read in the context of the whole decision, that paragraph is clearly referring to applications for mandatory reconsideration made within 13 months of the original decision, not late applications. I accept that the SSWP in her letter of 3 December 2015 stated "If you wish to appeal to an independent tribunal please follow the attached instructions", and I have found that the tribunal did not have jurisdiction to entertain an appeal. But this sentence in a letter from the SSWP cannot give a tribunal jurisdiction which legislation has not conferred. At another point in his submissions, PH also said that there was official error because a consultant psychiatrist had not included his condition of spondylolisthesis in his initial claim for DLA. There are two reasons why this is not official error. First, the claim form for DLA in the papers relevant to the decision of 28 February 2014 quite clearly mentions the claimant's spondylolisthesis (page 11). Second, official error in Regulation 3(5) is further defined in Regulation 1 of the 1999 Regulations as meaning error made by "an officer of the Department of Work and Pensions". Even if there had been such an error, nothing was produced to show that the relevant consultant psychiatrist was an officer of the DWP; ordinarily they are NHS workers. There is no scope for the application of Regulation 3(5) so that PH can avoid the jurisdictional time limits which result in him having lost his right of appeal.

31. *Exceptional circumstances*. Even if the *Adesina* principle could operate to extend the 13 month period in the jurisdictional provisions of the 1999 Regulations and 1998 Act (which as explained in paragraph 23 above it is not necessary for me to decide), I find that no extension could be granted in the circumstances of this case. First, PH did not do everything he could to request mandatory reconsideration timeously (*Adesina* paragraphs 14-15). His position was that he had been ignorant of the law about DLA in the 13 month period after the original decision about his DLA, but after he had found out he had done everything he could to bring it to the DWP's attention within the quickest time possible. However, it is clear from the papers that PH received a letter dated 28 February 2014 from the SSWP which told him clearly that he was receiving only the lower rate of the mobility component of DLA. That letter also on the third page had a section entitled "What to do if you think this decision is wrong" and informed him in bold he needed to make contact within one month of the date of the letter. But PH did nothing in response to this, although it would have been possible for him to dispute only receiving the lower rate of the mobility component much earlier than he did. Second, I do not consider that the circumstances count as exceptional within the meaning of the *Adesina* principle. I have already noted above the very limited scope for application of this principle. In this case what is being asked is that a 13 month limit for requesting mandatory reconsideration be extended by almost 5 further months under the jurisdictional provisions. But in *Adesina* itself Convention rights did not justify extending a far shorter period of 28 days. Being a party litigant in the context of social security tribunals is not an exceptional circumstance; many appellants represent themselves. PH listed a

number of very difficult circumstances in his life. In 2000 he was evicted from his home leading to various legal proceedings. His JSA was terminated in 2004/2006 due to disagreements over his level of savings and he had to borrow £15 a week from his mother for 2 years. By December 2006 the stress of his situation had resulted in mental health problems to the extent that he had required to be sectioned and was in hospital for 2 ½ years. Although clearly distressing, these are all historic matters and do not give rise to exceptional circumstances for PH having failed to submit a request for mandatory reconsideration within a 13 month period following a decision taken on 28 February 2014. PH referred at various points to the different cases he has brought in the Court of Session and Sheriff Court to try to right the wrongs he considers he has suffered, some of which appear to be ongoing, and the difficulties that litigating these cases as well as dealing with a DLA claim posed to him. But these are also not exceptional circumstances justifying non compliance with jurisdictional time limits. If the claimant is capable of litigating in the courts, it is difficult to see why he was not capable of acting on the information in the letter of 28 February 2014 and contacting the SSWP timeously.

32. Accordingly, the tribunal had no jurisdiction to entertain PH's appeal and should have struck out the case under Rule 8(2) of the Tribunal Rules. Although the reasoning of the tribunal leading to its decision to disallow the appeal could be clearer, the tribunal was correct in the result that it should not entertain the appeal. I therefore find that there was no material error of law, and it is not appropriate to set aside the decision.

SM's case

33. SM appealed in connection with a decision to terminate JSA. Although it was at one point disputed that SM had received a decision letter terminating his JSA, on 9 August 2016 the tribunal found as fact that a decision had been intimated to him on 24 November 2014. A letter from the SSWP in the same form as sent out to SM is in the bundle (p5). It contains similar wording as the letter to PH described above, to the effect that SM should get in touch within a month if he considered the decision was wrong, and warning that there was no appeal unless the SSWP had looked at the decision again, which was called mandatory reconsideration (with the result that the case falls within Regulation 3ZA of the 1999 Regulations and Rule 22(9) of the Tribunal Rules).

34. On 21 January 2016, SM's representative requested a revision of the decision of 24 November 2014 expressly on grounds of official error. This request for mandatory reconsideration was made approximately 14 months after the original decision to terminate JSA. The letter of 21 January 2016 specified the official error as a DWP official having responded to SM presenting a 2-week sick line from a GP by telling SM he could not remain on JSA and had to close his claim and make a claim for Employment and Support Allowance ("**ESA**") (to which he was not in fact entitled as he had no right to reside in the UK). The letter stated that it was an official error to give this advice to SM and to fail to consider Regulation 55 of the Jobseekers' Regulations 1996, which had the effect that

recipients could stay on JSA for sickness periods of 2 weeks. The SSWP had never produced anything in writing from SM saying that he proposed to claim ESA for the period of sickness within the provisions of Regulation 55(1). He should have remained on JSA. It was pointed out that the consequence of this error, which gave rise to a break in entitlement to JSA between 21 November 2014 and 1 December 2014, was that SM lost transitional protection applying to housing benefit (which would only have continued to apply if he had continuously received housing benefit). This ultimately resulted in rent arrears, eviction and homelessness. (SM appears to have been reinstated on JSA in December 2014, until again being found not entitled to JSA after failing the genuine prospect of work test in March 2015).

35. On 16 February 2016 the SSWP refused to revise the decision on the basis that the request was not received within 13 months of the decision being notified, and there was no official error because there was no evidence the claimant was advised to close his claim. (In passing, the "no evidence" comment was incorrect: there was evidence from SM that this is what he had been told. That evidence might be rejected by the SSWP if there were grounds to doubt SM's credibility, but it was factually wrong to say there was no evidence. It does not necessarily follow from the absence of records within the Department of Work and Pensions that the claimant's account was incorrect, particularly since the SSWP submitted at the hearing that its records are only held for 14 months).

36. On 23 May 2016, approximately 3 months later, HMCTS received SM's letter of appeal. On 9 August 2016 the First-tier Tribunal refused to admit the appeal on the basis that it was made 18 months after the date of issue of the SSWP's decision and therefore outside the time limit specified in Rule 22(5) of the Tribunal Rules (it was later accepted that this was a typographical error and it should have read Rule 22(8)). A request was then made on SM's behalf to reinstate the appeal, on the ground that an absolute time limit can be read down in exceptional circumstances and where an appellant had personally done all he could to bring an appeal timeously (*Adesina v Nursing and Midwifery Council* [2013] EWCA 818, *KK v Sheffield County Council* (CTB) [2015] UKUT 367 AAC para 15). SM had appealed the loss of housing benefit (having been reinstated on JSA after a two week break), and it was only after the determination of this housing benefit appeal that he realised that what he needed to appeal was the JSA decision because of the loss of transitional protection. The tribunal responded to the reinstatement request by finding that as the appeal had not been struck out under Rule 8(2) or 8(3) it could not be reinstated.

37. Permission to appeal to the Upper Tribunal was granted by a judge of the Upper Tribunal on 25 January 2017, on the basis that the tribunal judge had failed to explain why it was that the circumstances of the case did not meet the test in *Adesina*. In a submission for the SSWP, the issue of whether there was a right of appeal at all was raised. A sist was requested to wait for the case now reported as *R(CJ) and SG v SSWP* [2018] AACR 5. There was no opposition to a sist. After the sist was recalled, parties submitted further representations.

38. The SSWP conceded that the tribunal had jurisdiction to hear the appeal, because the application for mandatory reconsideration was on grounds of official error and the case fell within Regulation 3(5) of the 1999 Regulations. The application had therefore been considered by the SSWP within the meaning of Regulation 3ZA and there was jurisdiction to hear it under Section 12 of the 1998 Act. In my view, in SM's case, this concession is legally sound. In contrast to PH's case, the substance of SM's request for mandatory reconsideration made on 21 January 2016 was a complaint of official error. It was an "any time" application. Subject to official error being made out on the facts, the tribunal had jurisdiction to hear the appeal.

39. Given that the tribunal had jurisdiction, was it correct to find it could not exercise it because of limitation periods in the Tribunal Rules? In my view the tribunal erred in its consideration of the Tribunal Rules. Rule 22(9) states that mandatory reconsideration applies where the notice of the decision being challenged includes a statement to the effect that there is a right of appeal in relation to the decision only if the decision-maker has considered an application for revision, reversal, review or reconsideration (as the case may be) of the decision being challenged. As found in paragraph 33, the SSWP's decision of 24 November 2014 contained such a statement. Because mandatory consideration applied, the limitation period for bringing an appeal commenced, under Rule 22(2)(d)(i), on the date SM was sent notice of the result of mandatory reconsideration (16 February 2016). The appeal was brought over one month after that, so whether it could proceed depended on the application of Rule 22(8) to extend this period to excuse the further two month delay. If the SSWP did not object and the tribunal did not direct otherwise, then the appeal could proceed, if the discretion in Rule 5(3)(a) to extend for a period of up to 12 months was exercised in SM's favour. That would depend on the tribunal (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 of the circumstances of the case, so as to enable the tribunal to deal justly with the application. Weighty factors in this exercise would have been the nature and importance of the allegation of official error, and the effect on the claimant (which included having had to return to Poland following the difficulties he had experienced with work, benefits and housing). The tribunal erred in law; either it did not consider these relevant considerations or if it did it failed to give adequate reasons. The error was material, because if the discretion had been exercised in SM's favour, then his appeal could have proceeded and been determined on the merits. It is therefore appropriate that I set the decision aside.

40. At the hearing it became evident that parties were not agreed on whether there was, as a matter of fact, official error (although both parties agreed that whether official error was present was an issue of fact for the First-tier Tribunal). SM's representative pointed to the official error identified in the request for mandatory reconsideration dated 21 January 2016, which he said paragraphs 8 and 27 of decision C(IS)/2107/1998 supported as being official error. He also submitted that there was a widespread practice within jobcentres amounting to official error, to which SM had been subject, to require JSA claims to be closed before ESA

could be claimed, even though this was not necessary in law and based solely on the limitations of the computer systems to deal with concurrent ESA and JSA claims. The SSWP was not in a position to make representations about this new allegation of factual practices. However, the SSWP accepted that it had been policy at the time of the SSWP's original decision that a person could stay on JSA for two weeks with a sick line. The SSWP also accepted that an employee of the DWP giving advice in a jobcentre would be an officer for the purposes of the official error definition in Regulation 1 of the 1999 Regulations (the case of *AB v SSWP (JSA)* [2018] UKUT 43 being distinguishable on the facts). Given the differences between the parties on the facts, it will be necessary for the tribunal rehearing this case to consider whether the decision of 24 November 2014 arose from official error so that it has jurisdiction; if so, whether to extend the limitation period under Rule 22 to allow the appeal to proceed even though brought approximately 3 months after the notice of the result of the application for mandatory reconsideration; and if so, the merits of the appeal, all as more fully set out in paragraph 5 above.

DIRECTIONS FOR CASE CSJSA/513/2016

1. **The case is to be reconsidered at an oral hearing. The members of the First-tier Tribunal chosen to reconsider the case are not to be the same as the judge who made the decision which has been set aside. The Tribunal should have regard to this decision, and in particular paragraph 5 and 33-40 above.**

2. **The parties should send to the relevant HMCTS office, within one month of the issue of this decision, any further evidence upon which they wish to rely.**

3. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous Tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

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

A I Poole QC, Judge of the Upper Tribunal
Date: 22 November 2018