IN THE UPPER TRIBUNAL **Appeal No: CP/716/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Brighton on 28 July 2014 under reference SC177/14/00037 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to allow the appellant's appeal from the Secretary of State's decision of 26 June 2013 to the extent of deciding that the retirement pension overpaid to the appellant between 31 May 2004 and 14 April 2013 is not recoverable from the appellant under section 71 of the Social Security Administration Act 1992.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Appearances: Mr Toby Fisher of counsel, instructed by the Free Representation Unit appeared, on behalf of the appellant.

Mr Andrew Bird of counsel, instructed by the Government Legal Department, appeared on behalf of the respondent.

REASONS FOR DECISION

Introduction

1. This appeal addresses the important issue of whether there can be a "failure to disclose" in circumstances where the factual information is already known to the relevant office within the Department for Work and Pensions to whom it is said disclosure is due and, perhaps just as

importantly on the facts of this case, where the claimant knows that the relevant office already knows the relevant information.

Relevant factual background

2. The appellant reached his state retirement age of 65 on 26 April 1998 and from that date was awarded his state retirement pension. He then claimed and was awarded an increase in his state retirement pension with effect from 4 February 2002 in respect of his wife pursuant to section 83 of the Social Security Contributions and Benefits Act 1983. I will refer to this as the "dependency increase". On 21 May 2004 the appellant wrote to what was then, in general terms, the Benefits Agency seeking to inform it that his wife was due to her own state retirement pension with effect from 29 May 2004 and asking it whether his wife's receipt of her own state retirement pension would affect the dependency increase payable to him in his pension. A copy of that letter appears at page 107 of the appeal bundle. Its exact wording, after the appellant had set out his and his wife's national insurance numbers, was:

> "Please be advised my wife.....will receive her state pension starting on 29 May 2004. Please advise if this will affect "money for other people" I am currently receiving."

3. The copy of this letter before me, which the appellant had retained as a 'carbon copy', is of poor quality (no doubt because it is a copy of a copy) and it is in consequence somewhat difficult to read the address to which it was sent. However, it is sufficiently clear to show that it was an address in Tyneview Park, Benton, Newcastle-upon-Tyne with the postcode NE98 1BA. The appellant's case was that in response to this letter he was telephoned on 18 June 2004 by a woman – a Ms Helen Rowley – from the office to whom he sent the letter. He noted what she told him on the copy of the letter of 21 May 2014. The handwritten note said "Money for other people will depend on level of [wife]'s pension". In his appeal letter written on 24 July 2013 the appellant said of this

telephone conversation that Ms Rowley advised him that "providing my wife's pension is less than the dependants allowance, I should still be eligible to receive the dependants allowance. At that point in time my wife did not know how much pension she was due, as she was not entitled to a full pension. I would have assumed from then onwards you would decide whether or not I would receive the allowance". It is accepted that the appellant made no further relevant contact with any of the Respondent's offices about his wife's state retirement pension or the dependency increase after 18 June 2004.

4. The Secretary of State's written appeal response to the First-tier Tribunal advised that there was "no record within the retirement pension documentary records to indicate that [the appellant] contacted the appropriate benefit office timeously to disclose the fact that his wife had commenced receiving her own State Retirement Pension". The appeal response went on to concede that the dependency increase for the appellant's wife should have ceased automatically upon reaching her retirement age (of 60) but due to a fault in the "Department's computer system" the payment of the dependency increase continued to be paid. As for the appellant's letter of 21 May 2004 and his telephone conversation with Ms Rowley, the appeal response submitted that the Department had no trace of having received a letter from the appellant at that time. However, it accepted that Ms Rowley did work in June 2004 for the team within the Benefits Agency responsible for the payment of the dependency increases and as such it accepted that the appellant "had made contact with the Department at that time".

5. It is rightly accepted by both parties that as the appellant's wife's weekly entitlement to her retirement pension was greater than the amount of the dependency increase paid to the appellant in respect of his wife, pursuant to regulation 10(2) of the Social Security (Overlapping Benefit) Regulations 1979 the dependency increase should have ceased from 31 May 2004. It did not end, however, and the dependency increase continued to be paid to the appellant until 14 April 2013. It is for this reason that the appellant accepts that he was

overpaid this part of his retirement pension amounting to £25,199.10 from 31 May 2004 to 14 April 2013. The contested issue is whether that overpayment is recoverable from him under section 71 of the Social Security Administration Act 1992 ("the SSAA 1992") on the basis that the appellant had "failed to disclose" the material fact that this wife had claimed and received her own state retirement pension.

6. Notwithstanding his concession that the appellant had made 'contact' with the Department in May/June 2004, the Secretary of State's case in his appeal response to the First-tier Tribunal was that as the appellant's wife was not notified of the exact weekly amount of her state retirement pension until a letter was issued to her on 15 June 2004, at the time of receipt of this letter by his wife the appellant should have become aware that her weekly retirement pension exceeded the weekly dependency increase he received for her in his pension, and at that stage he should have notified the relevant pensions office paying him the dependency increase in his retirement pension of the amount of retirement pension his wife was receiving. It is noteworthy, however, that the form of wording used in the decision letter issued to the appellant on 26 June 2013 was simply that "the office that paid your benefit was not told at the correct time that [your wife] was in receipt of her own state pension".

7. The Secretary of State's argument here relied on leaflets BR2215 and BR2189, which the appellant had been issued with each year at the time of the annual uprating of his state retirement pension. The former said that if the appellant wanted to get in touch "You can write to us at the address shown on the letter sent with this leaflet". The relevant letters were not included in the appeal bundle. However, the leaflet carries the logo of *The Pensions Service*, the entitlement and overpayment decision letters of June 2013 all came from *The Pension Service*'s office at Tyneview Park in Newcastle-upon-Tyne, and the postcode of that office is identical to the postcode of the office to which the appellant addressed his letter of 21 May 2004. Nor has any evidenced case been

put forward by the Secretary of State to show that either the office the appellant had to 'contact' in 2004 or the office which paid his wife's retirement pension in 2004 were anything other than, or identified (to claimants) separate parts of, *The Pension Service*'s office in Newcastle-upon-Tyne at the NE98 1BA postcode.

8. The relevant part of the BR2215 leaflet on which the Secretary of State placed reliance had the following passage in it:

> "**About your spouse or someone looking after your children**
>
> **Tell your Pension Centre, Jobcentre Plus office, jobcentre or social security office if your spouse……..**
>
> - gets any benefit, pension, entitlement or allowance from the Department of Work and Pensions……."

This fell under a heading "**Changes you must tell us about**".

9. It was the Secretary of State's case to the First-tier Tribunal that the appellant was in breach of the requirement imposed by this leaflet by failing to notify "the Department of [his wife]'s award of pension when she first became aware of the amount awarded" even though it was said that the leaflet clearly advised him to do so. However, as shall be seen (see paragraph 27 below), the Secretary of State has rowed back from this submission in the appeal before the Upper Tribunal because, no doubt at least in part, of the lack of any clear and unambiguous instruction in this (or the other) leaflet (per *Hooper –v- SSWP* [2007] EWCA Civ 495; *R(IB) 4/07* at paragraph [56]) requiring the appellant to report the amount of his wife's state retirement pension.

10. As an alternative the Secretary of State argued that if it was found that the appellant had disclosed timeously details of his wife's state retirement pension then he was in breach of a continuing obligation to disclose in accordance with *R(SB)54/83*. It was argued that even if the appellant had disclosed timeously to the appropriate benefit office the material fact that his wife had claimed and been awarded her own

Category A state retirement pension, it was reasonable to have expected him to contact the appropriate benefit office again after the initial disclosure when his retirement pension continued to be paid without deduction.

11. The First-tier Tribunal dismissed the appellant's appeal and upheld the Secretary of State's decision that the overpayment was recoverable from him because he was "deemed to have failed to disclose the material fact that his wife had received state retirement pension". In its statement of reasons the First-tier Tribunal said that the letter of 21 May 2004 "certainly appeared to be genuine" and it accepted that the appellant had written it and that the endorsement dated 18 June 2004 related to a subsequent telephone conversation with Ms Rowley. It further accepted that the "Department accepted that the [appellant] did make contact at that time". It is unclear, unfortunately, what form of contact the First-tier Tribunal accepted was made at the relevant time: e.g. whether the 21 May 2004 letter had been received by the appropriate office.

12. The key reasoning of the First-tier Tribunal is, with respect, not a model of clarity. It referred to the leaflets I have referred to above and then reasoned that the appellant "should therefore have been aware of the fact that it would be reasonable to expect him to report the increase in his wife's pension each year". The tribunal continued that there had been a period of nearly eight years where the appellant would have been aware that he should not have received the dependency increase as he was aware that his wife was receiving her own state retirement pension in excess of the dependency increase, and both payments could not be made under the law. Even if the appellant was unaware of the actual amount of his wife's state retirement pension, the tribunal said he was under a legal duty to notify the Department each year when the pension increased. If he had done so from the earliest date of February 2005 then any further overpayments would have been avoided. For these reasons, the tribunal concluded that there had been a failure to notify the relevant benefit office timeously. (Quite how this reasoning

addresses the overpayment that arose between 31 May 2004 and February 2005 is left unexplained.)

13. I gave the appellant permission to appeal on two grounds.

> "First, could [the appellant] fail to disclose a fact which the Pensions Service already knew, namely that his wife had qualified for a state retirement pension in her own right? The correctness of the decisions in *CIS/1887/2002* and *GK –v- SSWP* [2009] UKUT 98 (AAC) (the latter perhaps doubted in paragraph 25 of *WH –v- SSWP* [2009] UKUT 132 (AAC) and *GJ –v- SSWP* [2010] UKUT 107 (AAC)) may fall to be considered on this appeal.
>
> In other words, is the failure to disclose test under section 71 of the Social Security Administration Act 1992 met solely by breach of regulation 32(1A) of the Claims and Payments Regulations 1987 or is there scope for a person who breaches the duty to "furnish" information under regulation 32(1A) to be found not to have failed to disclose under section 71? For example, where the relevant local office plainly knows the material fact. Or where the claimant furnishes the information by telephone or orally at the office but the relevant regulation 32(1A) duty is to furnish the information in writing (see *R(SB)12/84* and *R(SB)40/84*). And what of Lord Hoffman's closing sentence in paragraph 32 of *Hinchy* [2005] UKHL 16, reported as *R(IS)7/05*, that the person or office to whom disclosure is to be made "is not deemed to know anything which he did not actually know" (my underlining)?
>
> Second, and alternatively, had not [the appellant] by his letter of 21 May 2004 already disclosed to the Pensions Service his wife's immediately upcoming entitlement to her retirement pension (a letter which the 18 June 2014 phone call – accepted by the Secretary of State – would seem to evidence, and in any event see paragraph 14 of the statement of reasons), and therefore what further was there for [the appellant] to disclose?"

Relevant law

14. Before turning to the arguments made on this appeal, and to better inform those arguments, I should first set out the relevant statutory materials. I will address the relevant caselaw as and when needed in my discussion of the arguments put before me.

15. Section 71(1) of the SSAA 1992 provides relevantly as follows:

> "71.-(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –
> (a) a payment has been made in respect of a benefit to which this section applies; or
> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

It is not disputed that the state retirement pension is a benefit covered by section 71: see section 71(11)(a) of the SSAA 1992. The expression "failure to disclose" is not defined in the SSAA 1992.

16. Section 5 of the SSAA 1992 is titled **Regulations about claims for and payments of benefit**. It provided[1] relevantly as follows:

> "5.-(1) Regulations may provide-
>
> (h) for requiring any information or evidence needed for the determination of ….a claim [for benefit] or any question arising in connection with such a claim to be furnished by such person as may be prescribed in accordance with the regulations;….
>
> (i) for the person to whom, time when and manner in which a benefit to which this section applies is to be paid and for the information and evidence to be furnished in connection with the payment of such a benefit;
>
> (j) for notice to be given of any change of circumstances affecting the continuance of entitlement to such a benefit or payment of such a benefit."

Again, it is not disputed that the state retirement pension is a benefit to which section 5 applies.

[1] This section was amended with effect from 25 February 2013 by section 99 of the Welfare Reform Act 2012 so as to omit section 5(1)(h), add some additional words at the end of s.5(1)(j) and insert a new subsection (1A) in place of section 5(1)(h). It is not suggested that any of these changes have any material bearing on this appeal.

17. Lastly of relevance in the statutory scheme is regulation 32 of the Social Security (Claims and Payments) Regulations 1987 ("the Claims and Payments Regs"). The two material parts of that regulation are paragraphs (1A) and (1B), which at all times material to this appeal have provided as follows:

> "32.-(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded.
> (1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect:
> (a) the continuance of entitlement to benefit; or
> (b) the payment of benefit
> as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office-
> (i) in writing or by telephone (unless the Secretary of State determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone; or
> (ii) in writing if in any class a case he requires written notice (unless he requires in any particular case to accept notice given otherwise than in writing."

By regulation 2(1) of the same regulations, "'appropriate office' means and office of the Department for Work and Pensions…".

Arguments

Secretary of State

18. In a detailed submission, written by Mr Wayne Spencer, the Secretary of State argued that following the decisions of the Tribunal of Commissioners and the Court of Appeal in *R(IS) 9/06* the 'failure' in failure to disclose amounted to a failure to discharge a legal duty to disclose, and the relevant duties to disclose were to be found in this case in regulation 32(1A) and 32(1B) of the Social Security (Claims and Payments) Regulations 1987. It was further argued, somewhat charitably in my view given the opacity of the tribunal's reasoning, that the first duty the appellant had been under was under regulation 32(1A) and resulted from the written instruction he had received in the

leaflets referred to above which, it was argued, required him to notify the Department if his spouse received any benefit. The second duty, this time under regulation 32(1B), arose from the 18 June 2004 telephone conversation. The Secretary of State continued to argue at this stage in the proceedings that this conversation had made the appellant aware that his wife's pension would affect his own entitlement if it was equal to or more than the dependency increase he received for his wife. Once furnished with the information that his wife's pension was of a greater amount than the dependency increase, the appellant could reasonably have been expected to know that this change might affect his benefit and so was a change he should notify to the Secretary of State.

19. The Secretary of State argued that at this last stage in its analysis the tribunal had erred in law by failing to investigate whether anything said by Ms Rowley in the telephone conversation of 18 June 2004 had modified any duty the appellant may have been under such that he did not need to further communicate with the *Pensions Service* in Newcastle-upon-Tyne when the exact amount of his wife's state retirement pension became known to him. Reference was made here to *R(A)2/06*. In a later submission, which I address below, the Secretary of State resiled from this argument, and in any event it is not necessary to address it in substance.

20. The Secretary of State's argument then turned to the point I had raised in giving permission to appeal about whether the appellant could fail to <u>disclose</u> to the *Pensions Service* office in Newcastle-upon-Tyne anything to do with his wife's pension which it was also paying. Mr Spencer referred to paragraphs 19 and 25 of the Tribunal of Commissioner's decision in *R(SB) 15/97* in which they said:

> "19. *In Foster v Federal Commissioner of Taxation (1951) 82* CLR 606, an Australian decision cited to us by Mr. Powell, Latham CJ said at pages 614 and 615—
>
> > "In my opinion it is not possible, according to the ordinary use of language, to 'disclose' to a person a fact of which he is, to the

> knowledge of the person making a statement as to the fact, already aware. There is a difference between 'disclosing' a fact and stating a fact. Disclosure consists in the statement of a fact by way of disclosure so as to reveal or make apparent that which (so far as the 'discloser' knows) was previously unknown to the person to whom the statement was made. Thus. . . .the failure of the [plaintiff] to repeat to the Commissioner what he already knew did not constitute a failure to disclose material facts."

> "25. The Shorter Oxford English Dictionary (3rd edition) defines the verb to "disclose" as meaning to "open up to the knowledge of others; to reveal". We respectfully agree with Latham C.J.'s opinion that disclosure consists in the statement of a fact so as to reveal that which so far as the discloser knows was previously unknown to the person to whom the statement was made."

21. Mr Spencer accepted that if this view was taken it was arguable that the appellant could not disclose his wife's pension and therefore could not fail to make such a disclosure. However he argued, relying on *GK –v-SSWP* [2009] UKUT 98 (AAC), that a new understanding of "failure to disclose" had been introduced following *R(IS)9/06* which renders any inherent meaning of "disclose" irrelevant in the context of section 71(1) of the SSAA 1992. Paragraph 23 of *GK* was referred to, which says:

> "it seems to me that following the decision in *B* and in particular the remarks of Buxton LJ cited above, section 71 is sufficient to provide a remedy for breaches of all those duties as long as the terms of such duties are capable of falling within the word "disclose" (as the Tribunal of Commissioners and Court of Appeal held those imposed by regulation 32 are). Therefore, a breach of a regulation 32 duty will lead, subject to questions of causation, to entitlement to recover under section 71. Insofar as paragraph 16 of CIS/1887/2002 is to be read as suggesting that a breach of regulation 32 requirements may escape the sanction of section 71 if it does not also fall within an additional test linked to an inherent meaning of the word "disclose", I would respectfully decline to follow it. Rather, *B* has clarified the meaning to be given to "failure to disclose" in the context of section 71 so as to prevent the possibility of such a double test arising. Likewise, where in CG/5631/1999, a decision of a Tribunal of Commissioners, it is stated, though without argument, that:
>
> > "It is well established that there can be no failure to disclose something which is already known to the person to whom disclosure might otherwise be owed"
>
> I do not consider that it remains good law following the decision of the Court of Appeal in *B*, which I am required to follow."

It was argued by the Secretary of State that on this analysis if there had been a breach of regulation 32(1A) or 32(1B) of the Claims and Payments Regs "it follows without further ado that there has been a failure to disclose for the purposes of section 71(1)". The argument continued:

> "There is nothing that necessarily prevents a duty arising in relation to something the relevant office already knows….the Secretary of State is entitled to instruct the claimant to repeat or confirm a material fact that the office in question already knows …..; and if a claimant fails to do this, he will have failed to discharge a duty imposed by regulation [32(1A) or (1B)] (as appropriate) and thereby will have failed to disclose the fact in question."

22. The Secretary of State's written argument continued, however, that this general rule may sometimes have to be qualified in the case of changes that emanate from the very office to which the claimant is required to disclose a change of fact, and various different decisions of the social security commissioners and judges of the upper tribunal (AAC) were cited in support of this argument, such as *CSB/677/1986*, *CIS/546/1991*, and *CIS/1887/2002*. Particular reliance was placed in this regard on paragraph 21 of *GJ –v- SSWP* (IS) [2010] UKUT 107, where the following was said:

> "The requirements in INF4(IS) 4/06 and its predecessors were made under these regulations, and must be read in that context. The regulations can only provide for information or evidence to be provided that falls within section 5(1)(h)-(j) of the 1992 Act. Neither they nor any requirements made under them can require pointless information to be given, and the regulations and the requirements need to be construed where possible so that they only require potentially relevant information to be given. Thus it is clear that there can be no breach of an obligation to provide information to the local office of a change of benefit that the same local office has just notified to the claimant. That is not, in my view, because of the application of the doctrine of waiver as suggested by Judge Ward in paragraph 22 of [*GK*], but because there is no conceivable basis on which such information could lawfully or sensibly be required, or indeed wanted, by the local office. Both the regulations and the requirements are to be construed to exclude such absurdities."

23. It was suggested by Mr Spencer on behalf of the Secretary of State that it was perhaps possible to subsume the approaches taken in all of the cited cases within the dictum of Lord Hoffman in paragraph 22 of *Hinchy –v- SSWP* [2005] UKHL 16; [2005] 1 WLR 967 (also reported as *R(IS)7/05*) that "a disclosure which would be thought necessary only by a literal-minded pedant (see, for example, CSB/1246/1986) need not be made". In any event, it was argued that the analysis in *GJ* was correct and that the tribunal had erred in law in failing to consider whether information about actual payment of the appellant's wife's own state retirement pension could conceivably be required in the circumstances of this case. It was said further in this regard that consideration should have been given to the office arrangements within the *Pensions Service* and to whether those responsible for paying the dependency increase in the appellant's state retirement pension would have become aware of the appellant's wife having "actually been awarded a retirement pension in her own right".

24. However, no information or evidence was been provided by the Secretary of State on this appeal about any division in the *Pension Service*'s office in Newcastle-upon-Tyne between one part of the office dealing with dependency increases in retirement pensions and another part dealing with the appellant's wife's retirement pension. Nor has any evidence been provided to show that the information provided to the appellant clearly identified different parts of the said office in Newcastle-upon-Tyne dealing with dependency increases in retirement pensions and the retirement pension themselves. And, in my judgment, it is not obvious what such differences would have been given that the said office was responsible for dealing with retirement pensions, of which the dependency increase are simply a part.

25. In directing an oral hearing of the appeal I raised, again, whether the appellant's letter of 21 May 2004 constituted proper disclosure of the appellant's wife's pension to the relevant part of the DWP before any

overpayment had begun, as this point did seem to have been addressed directly in the Secretary of State's written response on the appeal.

26. In a further written response from Mr Spencer it was argued, indeed accepted on behalf of the Secretary of State, that on the First-tier Tribunal's findings concerning the letter of 21 May 2004 and the telephone call of 18 June 2004, the appellant had made timely notification (in advance) that his wife would be getting her own state retirement pension from the end of May 2004 and he had therefore "fully and finally discharged the duty to disclose under regulation 32(1A) [of the Claims and Payments Regs]". This was because the requirement imposed by the relevant part of the BR2215 leaflet set out in paragraph 8 above was for the appellant to "Tell [his] Pension Centre….if [his] spouse]…. gets any…pension…from the Department for work and Pensions…", and that he had done. It was accepted that the First-tier Tribunal had therefore erred in law in holding the overpayment was recoverable from 31 May 2004, as the relevant disclosure had been made in May 2004.

27. The further submission argued, however, but stepping back from the submissions referred to in paragraphs 6, 9 and 18 above and providing a different argument, that the First-tier Tribunal had been correct to hold that the appellant was in breach of the duty imposed by regulation 32(1B) of the Claims and Payments Regs by failing each year, from February 2005, to report the annual uprating increases in his wife's retirement pension to the *Pension Service*'s office in Newcastle-upon-Tyne. It was argued that in effect the tribunal had considered that each annual uprating of his wife's retirement pension was a change of circumstances that the appellant might reasonably have been expected to know might affect the dependency increase he was receiving for his wife, and which he therefore could reasonably be expected to disclose back to the office administering his retirement pension. On this basis, it was argued by the Secretary of State that the tribunal was entitled to find that each of the appellant's failures to notify the annual uprating increase to his wife's retirement pension was both a separate breach of

regulation 32(1B) and a failure to disclose for the purposes of section 71(1) of the SSAA 1992.

28. Mr Spencer added in this submission that it seemed highly unlikely that Ms Rowley would have made any comments about whether or not the appellant needed to report any subsequent increases in his wife's retirement pension, thus in effect dropping his support for the appeal on the *R(A)3/06* ground referred to above.

29. In his skeleton argument on behalf of the Secretary of State Andrew Bird of counsel accepted that the First-tier Tribunal's decision that there had been failure to disclose effective from 31 May 2004 could not stand in law given the tribunal's finding that the appellant had sent the letter of 21 May 2004 and had spoken to Ms Rowley on 18 June 2004. However he continued to argue on behalf of the Secretary of State that the appellant had acted in breach of regulation 32(1B) of the Claims and Payments Regs, and so had failed to disclose for the purposes of section 71 of the SSAA 1992, in not reporting the annual uprating in his wife's retirement pension each year from February 2005. Even if the appellant did not know the precise quantum of his wife's pension, he was aware that state retirement pensions were uprated each year (as his pension was) and so was aware that his wife's pension was subject to the same increases.

30. The remaining issue of law, it was argued, was whether there could be said to be failure to disclose a fact when another part of the same office knew the same fact. The evidential basis for there in fact being another part of the *Pension Service*'s office in Newcastle-upon-Tyne was not set out. It was said that the default position was correctly set out in *GK*. Applying the Court of Appeal's decision in *R(IS) 9/06*, it was argued there had clearly been an obligation to "notify" the fact of the appellant's wife's annual uprating increases to her retirement pension under regulation 32(1B) based on what the First-tier Tribunal had found the appellant had been told by Ms Rowley. Following *Hinchy*, the appellant was not entitled to assume that the office determining the

quantum of his pension would know about these annual uprating increases (to his wife's pension) and automatically take them into account.

Appellant

31. The appellant, by now represented by the Free Representation Unit and, through them, by Toby Fisher of counsel, made a number of arguments against any of the overpayment being recoverable from him.

32. He first adopted, unsurprisingly, the Secretary of State's concession that the overpayment was not recoverable from 31 May 2004, as it could not credibly be argued that the appellant had failed to disclose the fact that his wife had started to receive her own retirement pension with effect from the end of May 2004.

33. Turning then to the argument that the appellant had failed to disclose the annual uprating in his wife's pension, it was argued that this conclusion was not open on three bases.

    (i) First, there was no legal duty to disclose this fact as such disclosure (a) would be thought necessary only by a literal minded pendant, and/or (b) because the annual uprating was a matter of common knowledge, and/or (c) the annual uprating was known within the appropriate office within the Pensions Service.

    (ii) Second, there was no legal duty to disclose the fact that his wife's pension was uprated as that fact was not known to the appellant.

    (iii) Third, no sufficiently clear instruction or guidance had been given to the appellant to impose a legal duty on him under regulation 32(1B) to notify to an appropriate office the fact that his wife's state retirement pension had increased annually each year on the annual uprating.

34. It was argued in the alternative that if there had been a failure to disclose the annual increase in the appellant's wife's state retirement pension from February 2005, this did not cause any overpayment.

Discussion and conclusion

35. I need only address in detail the first argument made by the appellant as in broad terms, and for the reasons given below, I accept it. As that argument is determinative of the appeal in the appellant's favour, I need not address any of the other arguments he made. I will, however, address in passing the argument, albeit in another context, on regulation 32(1B). If this appeal is to go any further, the arguments I have not needed to decide can be resurrected, if necessary; and if they are determinative in any other case then they can be addressed in that case.

36. The fundamental issue in any event on this appeal is what is caught by the phrase "failure to disclose" in section 71 of the SSAA 1992 and whether breach of regulation 32(1A) or 32(1B) of the Claims and Payments Regs, to use Mr Spencer's words, "without further ado" and in and of itself amounts to a failure to disclose for the purposes of section 71. Even though section 71 may only set out the consequences of any breach of duty, as a matter of law it only mandates an overpayment to be recoverable where there has been (as relevant to this case), a failure to disclose.

37. It is important in my judgment to begin the analysis by focusing on what is in issue on this appeal and what has fallen away. It is no longer any part of the Secretary of State's argument that the appellant was under a continuing obligation to disclose his wife's receipt of her own retirement pension after the end of May 2004. It is at the very least doubtful, in my judgment, what scope there is for such a continuing obligation, and *R(SB)54/83*, following *R(IS)9/06*. If a claimant has in fact notified the DWP office named on the leaflet of evidence or information that leaflet required to be notified, then very arguably the necessary disclosure has been made and no further duty to disclose the same information could be said to arise under that leaflet pursuant to regulation 32(1A) of the Claims and Payments Regs. A difference might

arise where the notification was not successful, but that in my judgment is not answered by any notion of a continuing obligation but rather, at least very arguably, by the obligation or requirement to notify not having been met in the first place On the same facts as posited it is likewise difficult to see where regulation 32(1B) of the Claims and Payments Regs would have any purchase (i.e. where the required information had been notified), because it is difficult to see what the *change* in circumstances would then be such that regulation 32(1B) could be said to apply.

38. More importantly, however, it is now accepted that the appellant **had** fulfilled his duty under regulation 32(1A) of the Claims and Payments Regs by notifying the *Pension Service*'s office at the NE 98 1BA postcode address in Newcastle-upon-Tyne in advance that his wife was to get her own state retirement pension and the date from which she was to receive it. The importance of this point may, with respect, possibly have been lost on the Secretary of State. I say this because it was the fact that the appellant's wife was getting a state retirement pension in excess of the dependency increase the appellant was receiving in his state pension which, in essence, was the reason for the overpayment[2]. (I stress that I am not here seeking to stray into, or decide anything on, causation, though this point would plainly be relevant to that argument.) However, the Secretary of State has accepted on this appeal that the appellant had done all he had been required to do by notifying the office in Newcastle-upon-Tyne (in advance) of the fact that his wife was to get her own state retirement pension, and further accepts that the leaflets did not require the appellant to tell that office of the amount of his wife's pension.

[2] I accept that even if the wife's state pension had been less than the amount of the dependency increase it would still have given rise to an overpayment. This is because, as Mr Spencer correctly pointed out, the effect of regulation 10(2)(b) of the Social Security (Overlapping Benefit) Regulations 1979 is that even where the spouse's state pension is *less* than the dependency increase, the former is in effect deducted from the latter. Therefore *any* state pension the appellant's wife received would have given rise to an overpayment if it had not been set off against the dependency increase. That does not affect, however, the point that it was the amount of the wife's state retirement pension which was primarily relevant to the level, if any, of the dependency increase.

39. Moreover, the Secretary of State has abandoned any argument that the 18 June 2004 telephone call gave rise to a duty on the appellant, pursuant to regulation 32(1B) of the Claims and Payments Regs, to notify the same office of the *amount* of his wife's weekly entitlement to her state retirement pension once it became known to her and then him. I can see why that argument was abandoned, and it is at this stage that I wish to touch on the argument made on behalf of the appellant concerning regulation 32(1B), albeit that argument is made in the context of notifying the annual uprating increases in the appellant's wife's pension from February 2005.

40. I say I can see why the Secretary of State has abandoned the regulation 32(1B) argument concerning the appellant notifying the amount of his wife's state pension for the following reasons. First, whether there was such a duty has to be seen in the context of what had gone before the telephone conversation and that includes what the leaflets did and, just as importantly, did not say. This it seems to me must follow not only from the "any change of circumstances….he might reasonably be expected to know might affect…" (my underlining) language of regulation 32(1B), with its focus on knowledge the claimant might reasonably be expected to have, but also from what Baroness Hale said in paragraph 55 of *Hinchy*, in respect of what is now regulation 32(1B):

> "…..the claimant cannot reasonably be expected to know that something might affect his claim to benefit unless the Secretary of State has made it clear what sort of changes might do so."

This is not to say that the telephone conversation is irrelevant, plainly that cannot be so, but is to say that it cannot be the sole determinative basis for the regulation 32(1B) duty in a case, as here, where information has been provided by the Secretary of State to the appellant.

41. Assuming that a reasonable claimant would, and the appellant had, read both of the leaflets referred to above, what they said needed to be reported (notably, simply to "your Pension Centre") was: (i) if your spouse gets any pension from the DWP; (ii) if you get the dependency increase in your state pension for your spouse, it will be affected if that person **earns** more than a certain amount; and (iii) (this time in the BR2189 form) "Contact your pension centre to tell us about a change in your circumstances and to find out what changes you must tell us about….We need you to tell us about things like…a change in the earnings of…a wife you get an increase in State Pension for [and] a change in occupational or personal pension of a..wife you get an increase in State Pension for" (p.9 of the 2/10 version of this leaflet), and "if your…wife is under 60…and you are getting an increase in your pension for them, please let us know **immediately** if they start work or if their earnings, including any occupational or personal pension, change" (p. 7 of 2/07 version of leaflet).

42. None of the leaflets therefore required any notification to be made about the amount of, or increases to, a spouse's own state retirement pension. Although I need not decide the point, I can therefore see the force in the appellant's argument that a reasonable claimant in the same position as the appellant on reading these leaflets might reasonably assume that having informed the Pension Centre in advance that his wife was to get her own state retirement pension, the lack of any requirement in the leaflets to inform the Pension Centre of the level of, or increases in, his wife's state retirement pension meant that Pension Centre had, or could obtain, such information for itself, and so such information did not need to be provided by him. That might then have provided the necessary starting point for any regulation 32(1B) argument concerning whether the appellant was required to notify the Pension Centre in Newcastle-upon-Tyne of the amount of his wife's state retirement pension after the 18 June 2004 telephone conversation.

43. If this would have been the correct starting point for such an argument, it is arguable that the note the appellant made contemporaneously of the 18 June 2004 telephone call - "Money for other people [i.e. the dependency increase] will depend on level of [wife]'s pension" – would not, in the context of what I have just said, have placed any requirement on the appellant to notify the Pension Centre of the amount of his wife's state pension when it was first received. The reasons for this are twofold. First, given the leaflets, arguably it would not have been reasonable for the appellant to know that his providing this information might affect the level of his state pension in a context where the leaflets indicated such information did not need to be provided by him. Second, and for similar reasons, it may arguably be difficult to characterise that his knowledge of the level of his wife's state pension – a pension which he had already told the relevant office his wife was to receive - was a *change* of circumstances which the appellant might reasonably have been expected to know needed to be notified back to that office, or indeed any office, because it might affect his state pension. Accordingly, it is at least arguable that the handwritten note alone provided no proper basis for a finding of breach of regulation 32(1B).

44. A better case for a finding of such a breach might have arisen when the appellant's later recollection of that conversation is added in to the considerations. However, that recollection was provided over 9 years after the events and may lack cogency for that reason alone. Moreover, the wording "providing my wife's pension is less than the dependants allowance, I should still be eligible to receive the dependants allowance" may not necessarily have provided a good basis for a finding that the appellant's knowledge[3] of the level of his wife's state pension was a

[3] Assuming against him that was a knowledge he then acquired (given a person cannot disclose that which he does not know – see paragraph 10(1) of the Court of Appeal's decision in *B-v- SSWP* [2005] EWCA Civ 929 (i.e. *R(IS) 9/06*). The appellant provided a witness statement on the appeal to the Upper Tribunal in which he said he and his wife had always had separate bank accounts and had administered their finances and paperwork separately, and "At no stage during the years 2004-2013 was I aware of the amount [my wife] was for her pension…".

change of circumstances that he might reasonably have been expected to know might affect his pension and so was required to be notified to the Pension Centre by him. It would certainly have been arguable, in my judgment, that even here, given the information provided in the leaflets, it might not have been reasonable for the appellant to realise that his providing his knowledge of this information to the Pensions Centre might affect his state pension. He might instead have reasonably taken the view, as he expressed it, that the Pensions Centre itself would have decided whether he should continue to receive the dependency increase.

45. In any event, I am not required to decide any such argument as it is not one that was made before me. Nor need I address the argument that the appellant was under a regulation 32(1B) duty to notify the annual uprating increase in his wife's state pension, as that argument is subsumed within the main argument as to whether he could *disclose* that information. The argument is that the appellant failed to disclose from 2005 onwards the fact of his wife's annual uprating in her state retirement pension.

46. It is worth repeating the critical part of the Secretary of State's argument on this point. This was that following *Hinchy* the appellant was not entitled to assume that the *Pension Service*'s office in Newcastle-upon-Tyne would know about the annual uprating increases to his wife's state pension and automatically take them into account. Stating the argument in my judgment, and with all due respect to the Secretary of State, reveals the absurdity of it. The annual uprating of benefits is a matter fixed by the Secretary of State in Social Security Benefits Up-rating Orders made annually pursuant to Part X of the SSAA 1992. Section 150 of that Act is within Part X and provides by subsection (1) that the:

> "Secretary of State shall in each year review the sums specified [in various parts of the Security Contributions and Benefits Act 1992 , including those covering retirement pensions]…in order to determine whether they have retained their value in relation to the general level of prices obtaining in Great Britain estimated in such manner as the Secretary of State thinks fit".

The uprating orders do not, for obvious reasons, descend to the updating named individuals' benefits or pensions on an individual basis. Instead, the levels of benefits or pensions are uprated on a category by category, or pension by pension, basis, and by a fixed percentage amount per category or pension.

47. The effect of the Secretary of State's argument is that the appellant had failed each year to disclose the fact and the amount of the fixed annual uprating in his wife's state pension to the *Pensions Service*'s office in Newcastle-upon-Tyne. In my plain judgment that was not information which the appellant could as a matter of law disclose to that office.

48. The meaning of the word "disclose" has been well settled under section 71 of the SSAA 1992 and its like-worded predecessors. As the Tribunal of Commissioners said in *R(SB)15/87* "disclosure consists in the statement of a fact so as to reveal that which so far as the discloser knows was previously unknown to the person to whom the statement was made". As was helpfully pointed out in *WH –v- SSWP* [2009] 132 (AAC) (at paragraph 29), the notion of 'disclosure' meaning revealing (in the mind of the discloser) something to another has support elsewhere in non-social security caselaw (see *Attorney General –v- Associated Newspapers Limited* [1994] 2 AC 238 at 255 and *BCCI –v- Price Waterhouse* [1998] Ch. 84 at 102), but the definition in *R(SB)15/87* is sufficient for section 71(1) of the SSAA 1992[4].

[4] In paragraph 5 of the Tribunal of Commissioner's decision in *CG/5631/1999* the test of disclosure that was stated, based admittedly in the context of a concession made by the Secretary of State, left out the perspective of the discloser as being relevant to whether material information or a material fact had been disclosed. It was stated that "[i]t is well established that there can be no failure to disclose something which is already known to the person to whom disclosure might otherwise be owed". That statement of the test is inconsistent with *R(SB)15/87*, which in my view as a reported decision should take precedence over the unreported decision in *CG/5631/1999*, and is inconsistent with Australian case of *Foster* followed in *R(SB)15/87* as well as seeming to be out of step with the

49. Given this test of what is meant by disclose, I cannot identify any sensible factual or legal basis upon which it may be said that the appellant could disclose to the *Pension Service*'s office in Newcastle-upon-Tyne that his wife's state pension had each year been uprated in accordance with the relevant uprating order, along with his and all other state retirement pensions. He could 'notify' them of that information but he would not be *disclosing* it to them. That information was plainly known to the Secretary of State and the appellant's state pension's office in Newcastle and, just as importantly, in my view the appellant would have known that that office knew that his wife's pension, which it must be recalled it is accepted he had properly disclosed to them his wife had been getting from May 2004, would likewise be uprated. Why? Because it was the same species as the state retirement pension he had been getting from 1998 which he had had uprated.

50. Before I develop this conclusion further I should say that in so far as what I say above turns on findings of fact, these are findings I am entitled to make. This is because it is common ground before me that the decision of the First-tier Tribunal on this appeal was erroneous in point of law and should be set aside, and it is therefore open to me to re-decide the first instance appeal making such findings of fact as are necessary to do so. In my view, I should re-decide the appeal given the overall length of these proceedings and the age of the appellant, and the opportunity both sides have had in the course of the Upper Tribunal proceedings to lay out their respective cases.

51. It is instructive to note that in *Hinchy* Lord Hoffmann was of the view that "[a] disclosure which would be thought necessary only by a literal minded pedant.....need not be made"(at paragraph [23]). Lord Hoffmann referred specifically here to the commissioner's decision *CSB/1246/1986*. In that case it had been decided that a recoverable

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Attorney General and *BCCI* cases cited above. For all these reasons, I decline to follow *CG/5631/1999*, though in fact no argument was made before me seeking to rely on it in contradistinction to *R(SB)15/87*.

overpayment had arisen in respect of the claimant's means-tested supplementary benefit because he had failed to disclose the material fact that his wife's unemployment benefit had increased under the annual uprating provisions. The supplementary benefit and unemployment were administered by separate offices. In allowing the claimant's further appeal Mr Commissioner Rice held that the officials responsible for the claimant's supplementary benefit:

> "knew, or ought to have known, that unemployment benefit was to increase on a specific date in accordance with the general uprating provisions. Such information was manifestly within the knowledge of [those officials].....information which is public knowledge - and the uprating provisions fall within this classification - is something which the claimant is not obliged to disclose."

52. The decision in *CSB/1246/1986* was decided after *R(SB)15/87* but without reference to it. In my judgment, its reasoning and conclusion is consistent with the meaning of disclosure put forward in *R(SB)15/87*, for the reasons I have explained in paragraph 49 above, and it supports the decision I have arrived at on this appeal. It is also a line of authority supported by the House of Lords in *Hinchy*[5]. This line of reasoning is also supported by the *GJ* case referred to in paragraph 22 above, where, to repeat, Judge Mark said "[no] requirements made under [section 5(1)(h) to (j) of the SSAA 1992] can require pointless information to be given". I note that in another appeal Mr Spencer submitted for the Secretary of State, relying on *GJ*, that there will not be a failure to "disclose" if the claimant knows that there is no point in telling an authority about the relevant fact because he knows that the authority is already aware of it: *BD –v- SSWP* [2016]UKUT 0162 (AAC) at

[5]I would venture to suggest, however, that this is not (per Lord Hoffmann) because such information amounts to a "disclosure" that need not be made, which leaves open the basis upon which it is to be judged who is or is not a literal-minded pedant and what, accordingly, need not be notified (see comments of Baroness Hale in paragraph 57 of *Hinchy*), but was something that could not as a matter of law be disclosed because the claimant knew that supplementary benefit and unemployment benefit were uprated annually and was entitled to conclude as a matter of fact that the officials administering his benefits knew this as well. *Hinchy* in this respect is only authority for the proposition that the relevant office or decision-maker "is not deemed to know anything which [they or] he did not actually know" (paragraph [32] of *Hinchy* - my underlining added for emphasis). I note also, albeit not part of any *ratio*, Baroness Hale's remarks in paragraph 57 of *Hinchy* about benefit offices not welcoming being notified by all claimants each and every time their rates of benefit changed.

paragraph 33. For the reasons I have already given, I consider that that submission of law was soundly made, being based properly on authority such as *R(SB)15/87*.

53. It seems to me that the above conclusion I have arrived at holds good even if in fact the appellant's state retirement pension (with the dependency increase) and his wife's state retirement pension were administered by separate offices. I say this because of the nature of the specific information which it is said in this case that the appellant had not disclosed, namely the annual uprating of his wife's state retirement pension. To adopt the language of *CSB/1246/1986*, that information was public knowledge and so would have been known to any separate office administering the wife's state retirement pension and, I am satisfied, the appellant would have known that the office responsible for administering his state retirement pension would have held that knowledge and would have known that the office dealing with his wife's pension held the same knowledge and would have uprated her pension accordingly.

54. However, in so far as it matters, on the evidence before me in my judgment there is no good evidence that there were separate offices of the *Pensions Service* administering the appellant's and his wife's state retirement pensions. I bear in mind that the onus of proving that the overpayment is recoverable from the appellant rests on the Secretary of State. Nothing, however, in the evidence, which I have read and reread, shows that the state retirement pensions were administered in separate offices or in identified separate parts of the same office. The appeal response made by the Secretary of State to the First-tier Tribunal referred homogeneously to the "Benefits Agency" and the "Department", and, notably, refers to "the Department" both in terms of the place where the appellant had to notify information and the place whose records showed that his wife had been notified of her entitlement to her state retirement pension on 15 June 2004; all of which suggests that both pensions were being dealt with by the same,

per *R(SB)15/87*, "office". And the benefits were one and the same – state retirement pensions – administered for two people living at the same address, which points to the likelihood of them being dealt with by the same office.

55. Furthermore, after I gave permission to appeal and raised expressly the question whether the appellant could have failed to disclose a fact "which the Pensions Service already knew, namely that his wife had qualified for a state retirement pension her own right", no argument and evidence was presented by the Secretary of State showing that the benefits were in fact separately administered. At highest, in paragraph 14 of his first submission to the Upper Tribunal, Mr Spencer raised the issue of remitting the appeal back to another First-tier Tribunal for it to make findings "as to whether the office arrangements (including any computer links) were such that the particular officers that were responsible for making decisions about the increase to the [appellant]'s retirement pension would automatically and inescapably become aware of the fact that the [appellant]'s wife had actually been awarded a retirement pension in her own right". I do not read this, however, as evidencing that there were in fact different offices but simply that this issue might need to be explored.

56. Therefore, insofar as it is necessary for me to do so, I find on the evidence before me that the two state retirement pensions were not administered in separate offices. (This case is therefore not wholly dissimilar to *CIS/4422/2002*.)

57. On this basis I accept the further submission on behalf of the appellant that, following *CSB/677/1986*, it would have been absurd for the appellant to have written a letter to the *Pension Service*'s office in Newcastle-upon-Tyne in or after February 2005 saying:

> "Dear Sir or Madam,
>
> You are aware that:
>
> a. I am in receipt of a state retirement pension which includes an increase for my wife.

b. My wife in in receipt of her own state retirement pension.
c. There recently has been an uprating of all state retirement pensions.
d. Both my wife's and my own state retirement pensions have been uprated in line with the general uprating.

I write to inform you of all these facts you already know."

For the reasons given above, this plainly in my judgment could not amount to disclosure to the appropriate office, and so there could have been no failure to disclose where, as in this case, such a letter was not sent, even assuming on the facts that the failure to send such a letter might have amounted to a failure to notify for the purposes of regulation 32(1A) or 32(1B) of the Claims and Payments Regs.

58. I must address, however, the Secretary of State's argument against all of the above based on paragraph 23 in *GK* –v- SSWP [2009] UKUT 98 (AAC). That argument is that paragraph 23 of *GK* is correct in holding that the effect of the Court of Appeal's decision in *B -v- SSWP* (*R(IS)9/06*) is that where there has been a breach of regulation 32(1A) or 32(1B) "without further ado" there has been a failure to disclose for the purposes of section 71(1) of the SSA 1992. I agree with the Secretary of State that this is the effect of what is said in paragraph 23 of *GK*, though I note that in that case the fact in issue had not become known to the relevant part of the office and, in any event, the claimant was not aware that the fact had become known to any part office. However, I do not, with respect, agree with the analysis in paragraph 23 of *GK*. This is for the following reasons.

59. Most fundamentally, I do not consider that any part of the ratio of the Court of Appeal's decision in *R(IS)9/06* was concerned with the meaning of "disclose". The concern the Court of Appeal had was with what was meant by "failure" and the identification of the corresponding duty a claimant could "fail" to meet. More particularly, it was concerned with whether "failure" (a) could admit of a test of what was reasonably to be expected (per *R(SB)21/82*), and (b) whether the

individual characteristics of a claimant (e.g. where she could not appreciate that which needed to be notified or disclosed) were relevant to whether the claimant was in breach of a duty to disclose.

60. This is apparent, in my judgment from the judgments of the Court of Appeal in *R(IS)9/06*. Lord Justice Sedley, who gave the leading judgment, identified the appellant's case in paragraph 9 of the Court of Appeal's judgment as being "that a claimant who is unable to understand that she has an obligation to report something has not "failed to disclose" it", and in paragraph 27 he framed the question as "is a claimant under any legal obligation to report more than she can reasonably be expected to report?" (thus bringing in the test from *R(SB)21/82*). Further, at the end of paragraph 36 he said "[i]f there is a reason for construing "failure" as involving fault, it has to be better than [the argument that had just been made]", and in the next paragraph he spoke about "failure" presupposing obligation and that it was in regulation 32 of the Claims and Payments Regs that the obligation was found, and that obligation could not admit of any additional or secondary "reasonably to be expected" test (paragraph 40).

61. None of this indicates to me that Lord Justice Sedley (with whom Sir Martin Nourse agreed and Lord Justice Buxton thought that nothing he said departed from what Sedley LJ had said) was seeking to address the meaning of "disclose", let alone positively change its long held meaning as set out in *R(SB)15/87*, which itself was based on the ordinary meaning of the word. On the face of regulation 32 of the Claims and Payments Regs and section 5(1)(h)-(j) of the SSAA 1992, neither is defining the meaning of the word "disclose" for the purposes of section 71(1). Nor can I see that either statutory provision, and particularly section 5(1)(h) to (j) of the SSAA 1992, empowers the cutting down or changing of the ordinary meaning of "disclose" in section 71(1) of the same Act.

62. The Tribunal of Commissioners whose decision was upheld by the Court of Appeal (with both then reported in *R(IS)9/06*) accepted that "the Secretary of State is only entitled to recover overpaid benefits in the specific circumstances prescribed by the statutory scheme" (paragraph 11 of its decision). The entitlement to recover is found in section 71(1) of the SSA 1992 and not section 5 of the same Act or regulations made under it. These last two statutory provisions do not, therefore, create any right of recovery of overpaid benefits. They are concerned, as their language makes plain, with imposing duties on persons to "furnish" or "notify" information and evidence. Nor can I identify anything in their statutory language which expressly, or by implication, sets out what the consequences are for failure to furnish or notify the information.

63. Accordingly, to be entitled as a matter of law to recover the benefit overpaid in this appeal the Secretary of State had to show, ignoring misrepresentation which does not arise on this case, that there had been a "failure to disclose" a material fact. If any failure to notify or furnish information did not amount to a failure to *disclose* then I cannot see any escape from the conclusion that in those circumstances section 71(1) provides no legal authority for the overpayment to be recovered. This conclusion is supported in my view by the Supreme Court's decision in *R(CPAG) –v- SSWP* [2010] UKSC 54; [2011] 2 AC 15, in which it held that section 71(1) (or some other specific statutory provision) provides an exclusive code for recovery, and so if section 71(1) is not met the Secretary of State cannot seek recovery of the overpaid sum.

64. I note that the Tribunal of Commissioners in *R(IS)9/06* addressed (in paragraph 24 of their decision) an argument that the duty necessary for there to be a failure to disclose could not be found in section 5(1)(h) – (j) of the SSA 1992 because it was (only) concerned with furnishing and notifying information and not disclosing it. The commissioners said that they did not consider these differences to be significant because the word "disclose" was wide enough to include the concepts of

"furnish" and "notify". That I entirely accept and in any event is binding on me. However, it is not in my judgment authority for a proposition that "disclosure" is *limited to* the acts of furnishing or notifying information. Beyond the passage in paragraph 24, there is no discussion of the meaning of the word disclose, or the legal basis for it, nor any suggestion that *R(SB)15/87* was wrongly decided. Like the Court of Appeal, the focus of the Tribunal of Commissioner's concern was on where the legal obligation that could give rise to a failure to disclose was to be found and whether such an obligation could accommodate, or be varied by, the personal attributes of the claimant.

65. I find nothing therefore in *R(IS) 9/06* that limits disclosure to furnishing or notifying. In consequence, and for the reasons I have given above concerning the common knowledge of the uprating provisions, in my view it is legally possible for a person to fail to notify information in breach of regulation 32(1A) or 32(1B) but not necessarily have failed to disclose that information under section 71(1) of the SSAA 1992.

66. Particular reliance was placed in paragraph 23 of *GK* on paragraph 47 of Lord Justice Buxton's judgment in the Court of Appeal in *R(IS)9/06*, where he said:

> "Read in isolation, the phrase "failed to disclose" might seem to be addressed to some sort of deliberate concealment, or conscious suppression, of a material fact. That might well be its application where the fact in issue is not one addressed by specific regulations, but is nonetheless determined to be "material". But that cannot be the expression's meaning or application where, as in our case, the fact in question is mandated for transmission to the Secretary of State by a specific regulation."

I do not, however, see this passage as running contrary to the conclusion I have arrived at above. As I have already noted, Buxton LJ did not appear to consider he was saying anything different to Sedley LJ, and I have been unable to identify anything in Lord Justice Sedley's judgment that cuts down the meaning of disclose identified in *R(SB)15/87*. Furthermore, the above passage from Lord Justice

Buxton's judgment has to be read in the context of the case being argued before him, in no part of which was it argued that the claimant could not disclose the information to the relevant office because she knew that office already held the information. The context can be seen if the remainder of Buxton LJ's paragraph 24 is set out:

> "Provided, as the Commissioners found in their paragraph 62, Mrs B knew the fact and was able to communicate it to others, then the language of failure to disclose comfortably fits her case. It is nothing to that point that she did not understand the **materiality** of the fact. That issue is determined in respect of this fact by regulation 32(1)."

67. Two other points have a bearing in terms of where Buxton LJ's judgment is directed. First, his paragraph 48 which immediately follows makes it clear, in my view, that he was fully aware of the distinction between 'failure' and 'disclose' and indeed recognises expressly that the decision in *R(SB) 21/82* which the Court of Appeal was concerned with was relevant only to the word 'failure' and had not sought to give any special meaning to the word 'disclose'. That language makes it most unlikely in my judgment that Buxton LJ was ascribing any special meaning to the word disclosure contrary to its ordinary meaning as identified in *R(SB)15/87*. Second, it does not seem to me that the language used by Buxton LJ in the passage from paragraph 47 cited in *GK* necessarily rules out "failure to disclose" arising in cases other than ones where the disclosure was mandated by regulation 32(1A) or 32(1B) of the Claims and Payments Regs.

68. The third reason why I do not find this part of the decision in *GK* to be convincing is because I do not consider that the decision in *CIS/1887/2002* can properly be explained away on the basis of the legal notion of waiver. Mr Bird for the Secretary of State eschewed any reliance on this aspect of *GK* and was unable to explain how it might apply. The decision in *CIS/1887/2002* is in my view better understood as being consistent with the long settled view of the meaning of the word disclosure under section 71(1) of the SSA 1992; a meaning which

for the reasons I have given has not been disturbed by *R(IS)9/06*. *GK* itself recognises that some factual situations, such as in *CIS/1887/2002*, should not be allowed to give rise to a recoverable overpayment under s. 71(1), but seeks to achieve this by the use of waiver. In my judgment, there is no need to introduce further legal concepts into the statutory scheme governing overpayments under section 71(1) of the SSAA 1992.

69. I appreciate that the conclusion I have arrived at suggests that the "failure to disclose" in section 71(1) might extend beyond the obligations to furnish and notify found under section 5(1) of the SSAA 1992 and in regulation 32 of the Claims and Payments Regs. That may mean that the obligation to disclose, if not in regulation 32, has to be found elsewhere, perhaps by implication under section 71. Whether that is so or not cannot, however, in my judgment alter the need to establish disclosure (ignoring misrepresentation) before an overpayment can lawfully be found to be recoverable under s.71(1) of the SSAA 1992.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 8th June 2017