IN THE UPPER TRIBUNAL **Case No. CPC/3/2016**
ADMINISTRATIVE APPEALS CHAMBER

Decision

'This decision is given under section 12 of the Tribunals, Courts and Enforcement Act 2007.

The Secretary of State's appeal against the First-tier Tribunal's decision of 4 September 2015 succeeds. I set that decision aside but substitute a decision to the same effect which is that the claimant's appeal against the decision of the Secretary of State dated 12 February 2014 is allowed. The claimant is entitled to state pension credit from 12 November 2012 to 20 August 2013 and from 12 February 2014 on the basis that he had no notional income from his personal pension plan with Aviva. There are also no grounds for superseding the decision of the First-tier Tribunal dated 12 July 2014 to the effect that the claimant is entitled to state pension credit from 21 August 2013 to 11 February 2014 on the basis that he had no notional income from that plan.'

Background and procedural history

1. The appeal relates to State Pension Credit ('SPC') and, in particular, whether the respondent was to be treated as in receipt of weekly notional income from a personal pension plan with Aviva (the 'Plan').

2. The respondent was a single man born on 17 March 1950 who had been awarded SPC from 12 November 2012. I shall refer to the decision awarding SPC as the 'Entitlement Decision'.

3. In 2010 the respondent had invested £91,329 in the Plan which was an Aviva Balanced Managed Fund. The investment was mishandled and it appears that the matter was eventually investigated by the Financial Services Ombudsman. The Plan allowed drawdown against 'crystallised funds' within certain limits (see page 112 of the Upper Tribunal bundle).

4. On 13 February 2013 the Department of Work and Pensions became aware of the existence of the Plan and sent Aviva a form PPR1 to complete. On 20 February 2013 they received a letter and the completed form PPR1 from Aviva. The form described the Plan as an 'income drawdown policy' which allowed 'income' to be withdrawn at any time subject to an annual maximum income withdrawal of £6,575.70. The letter from Aviva said '*To date [the respondent] has not chosen to take any income from the plan'* (see pages 17 to 21 of the Upper Tribunal bundle).

5. The note to the pension provider at the bottom of page 1 of the form PPR1 reads:

> *'We need to know if the pension customer above is receiving or entitled to receive any entitlement from their personal pension … This might be in the form of a regular income payment, or as income withdrawal during a deferred annuity period.*
>
> *In the case of Money Purchase Schemes, Personal Pensions and Retirement Annuity Contracts do not send illustrations of what the customer would*

receive if they were to purchase an annuity. We require information on income withdrawal available to the customer …'

6. Form PPR1 asked the pension provider to give a figure for 'the maximum income withdrawal without deduction of lump sum entitlement' available to the respondent. It was the annual figure taken from Part 2 of form PPR1 which was used by the decision-maker to calculate the weekly amount of notional income from the Plan for SPC purposes (see page 20 of the Upper Tribunal bundle).

7. As at 5 July 2013 the Plan had gone down in value to £90,818 and a year later it had gone down further to £90,410.69 (see letter from Aviva of 31 March 2015 at page 102 of the Upper Tribunal bundle).

8. On 24 July 2013 a decision-maker superseded the Entitlement Decision with a decision that the respondent would not be entitled to SPC from 21 August 2013 on the grounds that from that date the respondent would be deemed to be in receipt of weekly notional income of £128.33 from the Plan. I shall refer to this decision as the 'Supersession Decision'.

9. On 21 August 2013 the respondent appealed against the Supersession Decision.

10. On 6 February 2014 the respondent made a claim for compensation from the Financial Services Compensation Scheme who it seems later advised him not to make any changes to the Plan while the matter was being dealt with by them.

11. On 12 February 2014 a further decision was made on the respondent's award of SPC. This was that as, from 12 February 2014, the respondent had stopped working, he was entitled to SPC of £21.90 weekly after taking into account notional weekly income of £126.45 from the Plan. I shall refer to this decision as the 'Second Decision'.

12. On 14 July 2014 the First-tier Tribunal (the 'FtT') allowed the respondent's appeal against the Supersession Decision. The FtT decided that the respondent did not have notional income from the Plan and set aside the Supersession Decision. I shall refer to this decision as the 'First FtT Decision'. The FtT were unaware of the Second Decision.

13. The FtT's reasoning was, in essence, that, as the Plan had not achieved any growth at the relevant date, any withdrawals which the respondent made would reduce the capital value of the Plan and those receipts were therefore capital, not income in his hands. In the FtT's view there was no basis on which the right to withdraw amounts which had the effect of reducing capital could be treated as a right to receive notional income for SPC purposes. Labelling a sum 'income' did not have the effect of converting it from capital into income (see paragraphs 11 to 15 of the Statement of Reasons for Decision at pages 24 to 26 of the Upper Tribunal bundle).

14. Although the Secretary of State's view was that the First FtT Decision was wrong in law (see page 10 of the Upper Tribunal bundle), the First FtT Decision was not appealed.

15. On 23 October 2014, the Secretary of State implemented the First FtT Decision in respect of the period from 21 August 2013 to 11 February 2014 (see page 103 of the Upper Tribunal bundle). In so far as there was a refusal to give effect to the First FtT

Decision in respect of the period from 12 February 2014, this decision was taken by the second FtT as a refusal to revise the award of SPC from 12 February 2014 (contained in the Second Decision) (see paragraph 57 of the Statement of Reasons for Decision at page 147 of the Upper Tribunal bundle).

16. The respondent requested that the Second Decision be reconsidered and effect given to the First FtT Decision but on 2 February 2015 revision was refused.

17. On 6 February 2015 the respondent appealed on the grounds that the question of whether he was to be treated as in receipt of weekly notional income of £126.45 from the Plan had been determined in his favour by the First FtT Decision which had not been appealed by the Secretary of State (see page 5 of the Upper Tribunal bundle).

18. At paragraph 2 of an additional response to the Tribunal Service dated 9 April 2015 the decision-maker said that he had revised a decision (that he did not identify) as follows:

> '*The decision awarding state pension credit to [the claimant] from and including 12.11.2012 is revised. The decision failed to take account of the fact that [the claimant] had notional income. This is the pension investment fund which is currently in an untouched income drawdown scheme. Regulation 18 of the State Pension Credit Regulations 2002 provides that where someone fails to purchase an annuity or take income which is available they are to be treated as having income as prescribed. As the income drawdown policy was already in place at the outset notional income is to be taken into account from 12.11.2012. The amount of that income is the amount available (£6575.70 per annum) that in combination with his wages means the claim is disallowed from 12.11.2012 – 11.02.2014, from and including 12.02.2014 the cessation of work means that entitlement of £21.90 exists. That figure is increased to include £12.72 of savings credit from and including 11.03.2015 and is superseded and disallowed from and including 18.03.2015 as State Retirement pension is payable at that date. All sums previously paid are offset against the sums now due'.*

(Emphasis supplied - see page 40 of the Upper Tribunal bundle)

The response went on (at paragraph 50:

> *'It is submitted that the right to revise on the ground on error of law, official error and mistake as to or ignorance of a material fact grounds revision from 12.11.2014 and that as the decision is effective from a date prior to 21.08.2013 it is not a supersession of that decision as originally made or of the subsequent tribunal decision and is not bound by the findings in relation to the later supersession which has been rendered null and void.'*

19. On 4 September 2015 the same judge who had given the First FtT Decision allowed the respondent's appeal. I refer to this decision as the 'Second FtT Decision'. The FtT held that no notional income from the Plan fell to be taken into account in either the period from 12 November 2012 to 20 August 2013 or the period from 12 February 2014. This was essentially on the same grounds as in the First FtT Decision. The FtT also held that the Secretary of State had neither the power to revise, nor grounds to supersede, the First FtT Decision and decided that the First FtT Decision stood with regard to the period from 21 August 2013 to 11 February 2014.

20. The Secretary of State was refused permission to appeal by the FtT on 26 November 2015 and on 22 December 2015 applied to the Upper Tribunal. The grounds are set out in Form UT2 (at page 159 of the Upper Tribunal bundle) and are that the FtT erred in law in concluding that no notional income from the Plan fell to be taken into account for SPC purposes for two reasons:

    (1) The notional withdrawals referred to in regulation 18(2)(a)(ii) of the State Pension Credit Regulations 2002 (the '2002 Regs') are always income, not capital, in the hands of the respondent; and

    (2) Regulation 18(3) 2002 Regs applies to determine the amount of 'income foregone' which is the 'maximum amount of income that may be withdrawn from the fund'. This was the amount shown as such on form PPR1 irrespective of whether withdrawal of that amount would deplete the capital of the Plan.

21. In giving permission to appeal Upper Tribunal Judge Rowland directed that the Secretary of State make submissions on the following issues:

    (1) Was it a question of fact whether the option to draw money from the Fund was an option to draw capital or income?

    (2) If it was a question of fact, was the FtT entitled to reach the decision it did for the reasons it gave?

    (3) If it was not a question of fact, was the Secretary of State entitled to supersede the First FtT Decision?

    (see page 169 of the Upper Tribunal bundle)

22. The Secretary of State's submissions of 6 October 2016 in response to Judge Rowland's directions are at pages 203 to 207 of the Upper Tribunal bundle and are:

    (1) It was question of law whether the option to draw money from the Fund was an option to draw capital or income. The relevant matters to be taken into account in settling that question were:

        (a) Pensions legislation;

        (b) The tax treatment of pensions payments;

        (c) The purpose of regulation 18(2) of the 2002 Regs; and

        (d) Public policy.

    (2) The respondent had appealed against the Supersession Decision. While his appeal was ongoing a new award of SPC was made from 12 February 2014 as a result of the respondent ceasing part-time work. The respondent had been advised to make a new claim as, on the Department's view of the matter, he was not entitled to SPC before he stopped working. This was because he was treated as in receipt of weekly notional income of £126.45 from the Plan which was added to his earnings. The Second Decision was not a revision or supersession of an earlier decision, it was a decision on a new claim. It was accepted by the appellant that the first FtT should have been informed of the Second Decision.

The legal framework

24. An appeal to a Judge of the Upper Tribunal will be successful only if the decision of the FtT is erroneous in point of law.

25. A decision will be erroneous in law if:

    (a) it contains a false proposition of law;

    (b) it is supported by no evidence;

    (c) the facts found were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question;

    (d) there has been any breach of the obligation to act according to the demands of natural justice;

    (e) there has been a failure adequately to observe the requirement to set out the reasons for the decision in writing.

26. The relevant parts of regulation 18 of the 2002 Regs provide that:

> *'(2) Where a person, who has attained the qualifying age, is a person entitled to money purchase benefits under … a personal pension scheme … and–*
>
> *(a) he fails to purchase an annuity with the funds available in that scheme where–*
>
> *(i) he defers, in whole or in part, the payment of any income which would have been payable to him by his pension fund holder;*
>
> *(ii) he fails to take the necessary action to secure that the whole of any income which would be payable to him by his pension fund holder upon his applying for it, is so paid; or*
>
> *(iii) income withdrawal is not available to him under that scheme; or*
>
> *…*
>
> *the amount of the income foregone shall be treated as possessed by him, but only from the date on which it could be expected to be acquired were an application for it to be made.*
>
> *(3) The amount of any income foregone in a case to which either head (i) or (ii) of paragraph (2)(a) applies shall be the maximum amount of income which may be withdrawn from the fund.'*
>
> (emphasis supplied)

27. Regulation 32(5) Social Security (Claims and Payments) Regulations 1987 (the '1987 Regs') allows the Secretary of State to request certain information from a pension fund holder where a person is claiming income support, state pension credit, jobseekers allowance or employment and support allowance. In the case of a personal pension plan where income withdrawal is available the Secretary of State can request details of:

'the maximum amount of the income which may be withdrawn from the scheme ...
calculated ... by means of tables prepared from time to time by the Government Actuary which are appropriate for this purposes'.

The request is made using form PPR1.

The oral hearings

28. I held an oral hearing on 23 February 2017 at which the Secretary of State was represented by Ms Fiona Scolding QC instructed by the Government Legal Department and the respondent by Ms Barnes of Counsel, instructed by the Free Representation Unit. I am grateful to Counsel for their submissions and for providing me with their skeleton arguments in advance of the hearing.

29. The argument at the first oral hearing related in the main to the question of whether the annual amount of £6,575 referred to by Aviva as the 'maximum income drawdown' was income foregone by the respondent for the purposes of the notional income provisions in regulation 18 of the 2002 Regs.

30. In brief, it was submitted on behalf of the Secretary of State that:

(1) It was a question of law whether the option to draw money from the Fund was an option to draw capital or income as it was a question of construction of the relevant legislation;

(2) The purpose of regulation 18 required that the annual sum of £6,575.70 be taken into account in calculating the respondent's notional income for SPC purposes and to decide otherwise would be against public policy;

(3) The respondent had failed to purchase an annuity with the funds in the Plan and he had also failed to take the necessary action to secure that income which could have been received by him was paid to him from the Plan so regulation 18(2)(a)(ii) of the 2002 Regs applied to him;

(4) The 'maximum amount of income which could be withdrawn from the fund' should be interpreted consistently across all the regulations where that phrase was used;

(5) The Secretary of State's proposed construction of regulation 18(3) was consistent with tax and pensions treatment.

These points are set out in full in the appellant's skeleton argument.

31. Ms Barnes argued on behalf of the respondent that the maximum income drawdown figure shown on from PPR1 was not his notional income for SPC purposes for the following reasons:

(1) The 'maximum amount of income which could be withdrawn from the fund' should be interpreted literally and 'income' should bear its ordinary meaning and (by implication) the figure taken from form PPR1 was irrelevant in circumstances where the fund stood at a loss;

(2) The 2002 Regs recognised a distinction between 'capital' and 'income';

(3) The purpose of regulation 18 required that the Plan generate income of which the respondent chose not to avail himself before it would bite;

(4) Public policy considerations worked against encouraging policyholders to deplete the capital of their pension funds;

(5) The respondent did not in fact have income available to him under the Plan at the relevant time as to withdraw amounts from the Plan would deplete the capital;

(6) The tax position was not determinative.

These points are set out in full in the respondent's skeleton argument.

32. At the conclusion of the first oral hearing I directed that the appellant make written submissions on the question of what (if any) was the statutory basis for using the information obtained from the pension fund holder under regulation 32(5) of the 1987 Regs as the maximum amount of the income which could be withdrawn from the Plan for the purposes of regulation 18(3) of the 2002 Regs.

33. The Secretary of State's written submissions were made on 17 March 2017. In them Counsel for the appellant again strenuously argued that it was appropriate for the Secretary of State to use the information obtained from the pension fund holder under regulation 32(5) of the 1987 Regs and concluded:

> *'There is no alternative basis in the Regulations which the Respondent could point to in respect of how income is to be assessed if the Appellant is incorrect in its submissions, and the Appellant submits that Parliament would not have intended such a matter to be left at large and/or for a calculation to be different depending upon the fund holder as that would lead to anomaly and inconsistency'.*

34. On 11 May 2017 I directed that the appellant instruct an independent actuary to answer the following question:

> *'In the absence of any express method of calculation (such as that which appears in regulation 42(2B) Income Support (General) Regulations 1987) in regulation 18(3) State Pension Credit Regulations 2002 how would the 'maximum amount of income which may be withdrawn from the fund' be determined in this case?'*

If there was more than one possible method of calculation, I directed that all the possible methods were to be set out together with an explanation of their relative merits.

35. On 16 June 2017 the appellant applied to set aside my directions of 11 May 2017. On 11 August 2017 I refused that application and on 26 October 2017 the appellant filed the witness statement of Mr Mark Shaw of the Government Actuary's Department (see pages 251 to 258 of the Upper Tribunal bundle).

36. At the appellant's request I held a further oral hearing on 21 December 2017 to explore the point set out in paragraph 34 above in the light of Mr Shaw's evidence. Again I am grateful to Counsel for their submissions at the hearing and for the skeleton arguments which they provided, all of which were most helpful in coming to my decision.

The Second FtT Decision

37. The Second FtT Decision is set out in the Corrected Decision Notice at pages 148 to 149) of the Upper Tribunal bundle. The decision was that the appeal was allowed on the basis that the respondent had no notional income from the Plan during the period from 12 November 2012 to 9 April 2015 and as result the Second Decision and the Revision Decision were set aside.

38. The FtT construed the decision referred to in the additional response to the appeal dated 9 April 2015 (the 'Revision Decision') as:

    (1) a revision of the Entitlement Decision in so far as it was concerned with the period from 12 November 2012 to 20 August 2013;

    (2) a purported revision of the First FtT Decision in so far as it was concerned with the period from 21 August 2013 to 11 February 2014; and

    (3) a revision of the Second Decision in so far as it affected the period from 12 February 2014.

    (see paragraph 57 of the Statement of Reasons for Decision at page 147 of the Upper Tribunal bundle).

    The revision of the Second Decision not being favourable to the claimant, did not cause the appeal to lapse (regulation 30 of the Social Security (Claims and Payments) Regulations 1999) and the appeal was treated by the FtT as though it had been against that decision as revised.

Was the Second FtT Decision wrong in law?

39. In the Corrected Decision Notice the FtT arguably ran together the Revision Decision and the decision of 23 October 2014 refusing to revise the Second Decision. However, as the Revision Decision was contained in an additional response to the appeal, it appears that it was intended by the Secretary of State that it should be considered by the FtT. There is no evidence in the papers before me that the Revision Decision was ever issued to the respondent with him being informed that he had a separate right of appeal as a result. In these circumstances, particularly as the Secretary of State has not taken the point, the FtT did not err in making decisions in respect of the periods covered by that decision and/or the decision of 23 October 2014.

40. It is accepted that the respondent was not in actual receipt of sums from the Plan at the relevant time. The FtT's decision was essentially that the respondent did not have notional income from the Plan as:

    > *'withdrawals from the capital fund remain capital and do not become income by virtue of being withdrawn whether on a one-off or regular basis.'*

    (see Summary Reasons in Decision Notice at page 139 of the Upper Tribunal bundle).

41. Section 15 of the State Pension Credit Act 2002 deals with the meaning of 'income' for SPC purposes and lists ten categories including income from annuity contracts, retirement pension income, income from capital and income of 'any prescribed description'. 'Retirement pension income' is defined in section 16 and covers income from a personal pension scheme and income from annuities purchased or transferred for the purposes of giving effect to rights under a personal pension scheme. 'Capital' is not defined but is to be construed in accordance with section 15 (section 17(1) State Pension Credit Act 2002).

42. Section 15(3) of the State Pension Credit Act 2002 allows for income and capital to be calculated or estimated in the prescribed manner and this is done by Part III of the 2002 Regs (regulations 14 to 24A). Section 15(2) gives the power to provide in regulations that a person's capital shall be deemed to yield him income at a prescribed rate. For the purposes of calculating deemed income the value of property held on trust (which would be the case with the assets of the Plan) is to be disregarded (paragraph 28 Schedule V 2002 Regs)

43. Regulation 18 of the 2002 Regs deals with notional income. The policy behind regulation 18(2) is an anti-avoidance one - to prevent successful claims for SPC by those who do not apply for pension income which they could receive and which, if received, would put them outside the income limits. However the provision goes further than that and deems a claimant to have income from his pension fund in a situation where income withdrawal is not available to him.

44. Regulation 18(1) treats a claimant who has reached the qualifying age for SPC as possessing certain forms of retirement pension income which had not been applied for or have been deferred. None of these are relevant here.

45. The following questions needed to be answered by the FtT in order to decide whether the respondent had notional income from the Plan by reason of regulation 18(2) of the 2002 Regs:

    (1) Was the respondent (who had attained the qualifying age for SPC) entitled to 'money purchase benefits' under the Plan?

    (2) If the answer to question (1) was yes, did the respondent 'fail' to purchase an annuity with the funds available in the Plan?

    (3) If the answer to question (2) was yes, did the respondent fall within one of the three circumstances in regulation 18(2)(a)(i) to (iii)?

    (4) If the answer to question (3) was yes:

        (a) what was the 'amount of the income foregone'; and

        (b) what was the 'date on which the income foregone could be expected to be acquired [by the respondent] were an application for it to be made'.

    (Regulation 18(2) 2002 Regs tailpiece).

46. The Plan was an income drawdown plan (see page 17 of the Upper Tribunal bundle). The Pensions Advisory Service explains income drawdown as follows:

> *'Income drawdown is where you leave your pot invested and take an income directly from it, instead of using the money in your pot to buy an income (an annuity) from an insurance company. Income drawdown is also known as an unsecured pension'.*

47. The FtT referred to the lack of evidence as to how the notional income of £6,575.90 a year was arrived at, noting that:

> '*The £6,575.70 relied on here is not apparently the income generated by the capital invested'.*

(see paragraph 36 of the Statement of Reasons for Decision at page 145 of the Upper Tribunal bundle).

48. It was confirmed by Counsel for the appellant at the first oral hearing that the figure provided by Aviva on form PPR1 as being the maximum amount of income that could be withdrawn from the Plan had, in fact, been calculated in accordance with the appropriate Tables prepared by the Government Actuary. It was unfortunate that the FtT were not given this information by the representative of the Secretary of State who attended the hearing on 4 September 2015.

Analysis by the Upper Tribunal

49. Dealing in turn with each element of regulation 18(2) and (3) of the 2002 Regs:

(1) I agree with Counsel for the appellant that the respondent had reached the qualifying age for SPC at the relevant date and was entitled to money purchase benefits under the Plan.

Money purchase benefits' were defined for this purpose in section 181(1) Pension Schemes Act 1993, the relevant parts of which are as follows:

> *' "money purchase benefits", in relation to a member of a personal pension scheme… means benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member and which are not average salary benefits;'*

(2) In *BRG v The Secretary of State for Work and Pensions* [2014] UKUT 0246 (AAC) Upper Tribunal Judge Turnbull decided that a person 'failed' to purchase an annuity for the purposes of regulation 18(2) of the 2002 Regs in <u>any</u> case where an annuity could have been purchased but had not been. Judge Turnbull's analysis was as follows (emphasis supplied):

> *'In the light of the wording and purpose of regulation 18(2) as a whole, in my judgment a claimant "fails" to purchase an annuity, and funds are "available" to him in the scheme, if he has the option to purchase an annuity prior to his originally selected retirement date. There is no difficulty in saying that funds are "available" to a claimant who, simply by making a request to that effect, can require funds to be applied, before his originally selected retirement date, in buying an annuity. It is at first sight rather less obvious that such a person "fails" to purchase an annuity. In general the word "fails" connotes a breach of some obligation, or at least the failure to do something which a person is expected to do. <u>But in this context it in my judgment means simply that the claimant does not purchase an annuity in circumstances where he could elect to do so</u>. The rationale for regulation 18 is that, in working out what a claimant should be paid by way of state pension credit in order to bring his income up to the guaranteed minimum, a claimant should be treated as possessing income which he has foregone. <u>Against that background it generally makes sense to regard the claimant as having "failed" to purchase an annuity in any case where an annuity could have been purchased but has not been.</u> That analysis is in accord with the decisions of Mr*

Commissioner (as he then was) Jacobs in CIS/4080/2001 and CIS/4511/2002'.

Judge Turnbull regarded the question of whether a claimant '*fail[ed] to purchase an annuity with … funds available in that scheme*', as a prerequisite in relation to all the three possibilities under regulation 18(2)(a)(i) to (iii). I agree with Judge Turnbull in this regard and adopt his reasoning.

(3) The letter from Aviva of 25 May 2010 confirmed that an annuity could be taken by the respondent 'at any time' (see page 116 of the Upper Tribunal bundle). As submitted on behalf of the appellant the respondent therefore 'failed' to purchase an annuity with the funds available in the Plan as at 21 August 2013. The FtT erred in law in overlooking the fact that an annuity could have been purchased by the respondent (see paragraph 49 of the Statement of Reasons for Decision at page 146 of the Upper Tribunal bundle). Because of this the FtT did not consider whether the respondent fell within any of the circumstances in regulation 18(2)(a)(i) to (iii) of the 2002 Regs..

(4) The appellant's submission to the Upper Tribunal when applying for permission to appeal against the Second FtT Decision was that, by not purchasing an annuity with the funds available in the Plan, the respondent fell within regulation 18(2)(a)(ii).as he had failed to 'take any necessary action to secure that the whole of any income which would be payable to him by [the Plan] upon his applying for it' was paid to him (see page 159 of the Upper Tribunal bundle). I agree with this submission.

(5) The final question to be answered by the FtT was what was the amount of the 'income foregone' for the purposes of regulation 18(2) of the 2002 Regs?

The amount of the income foregone is defined in regulation 18(3) as the 'maximum amount of the income which may be withdrawn from the fund'

I agree with Counsel for the appellant that it is the character of the claimant's notional receipt that is determinative and whether what he receives was income or capital of the Plan is irrelevant. The wording of regulation 18(2)(a)(ii) supports this conclusion:

…'fails to secure that the whole of any income which would be payable to him by his pension fund holder … is so paid'.

50. It was drawn to my attention by Counsel for the appellant at the second oral hearing (and also referred to in her skeleton argument) that regulation 18(3) of the 2002 Regs was amended with effect from 16 November 2017 to read:

'The amount of any income foregone in a case to which either head (i) or (ii) of paragraph (2) (a) applies shall be the rate of the annuity which may have been purchased with the fund and is to be determined by the Secretary of State, taking account of information provided by the pension fund holder in accordance with regulation 7(5) of the [1987 Regs]'.

(Regulation 10(3) of the Social Security (Miscellaneous Amendments No. 4) Regulations 2017 SI 2017/1015).

At the same time wording to the same effect was substituted for the definition of the maximum amount of income foregone in the provisions referred to in

paragraphs 52 and 53 below and also in the information-seeking powers in regulations 7 and 32 of the 1987 Regs.

51. Since the November 2017 amendment took effect regulation 18(3) of the 2002 Regs deems a claimant to have purchased an annuity for the purposes of calculating the amount of income foregone but before that, it did not. The Explanatory Note to the amending regulation reads:

> *'From April 2015 individuals are able to access their pension savings more flexibly. The amendments provide that the amount of income foregone is to be the rate of the annuity which may have been purchased with the pension fund and set our how that amount should be determined.''*

52. The 'amount of income foregone' was not defined in the 2002 Regs until 16 November 2017. However in the case of a claim for income support there was, at the relevant time, a requirement to calculate 'income foregone' in regulation 42(2A) of the Income Support (General) Regulations 1987. The amount of the income foregone was the amount set out in regulation 42(2B) and was:

> *'the maximum amount of income which may be withdrawn from the fund and shall be determined by the Secretary of State who shall take account of information provided by the pension fund holder in accordance with regulation 7(5) of the Social Security (Claims and Payments) Regulations 1987'*

(emphasis supplied)

53. Regulation 42(2B) in substantially this form had been inserted in the Income Support (General) Regulations 1987 by regulation 6(4)(b) of the Income-related Benefits Schemes and Social Security (Claims and Payments) (Miscellaneous Amendments) Regulations 1995 (SI 1995/2303). Identical wording was also inserted in regulation 105(4) of the Jobseeker's Allowance Regulations 1996 by SI 1995/2303 and the same wording was included in regulation 106(6) Employment and Support Allowance Regulations 2008 when it was enacted. The Explanatory Note to SI 1995/2303 is not helpful, saying only that the purpose of the amendment was to 'extend the provision governing the calculation of notional income as it has effect with respect to personal pensions and retirement annuity contracts'.

54. Regulation 7(5) of the 1987 Regs allowed the Secretary of State on a claim being made for benefit (which includes SPC) to request details from a pension fund holder of:

> *'the maximum amount of the income which may be withdrawn from the scheme ...calculated ... by means of tables prepared from time to time by the Government Actuary which are appropriate for this purpose'.*

The tables prepared by the Government Actuary which are used for the calculation are referred to as the 'GAD Tables'.

Regulation 32(5) of the 1987 Regs allows the Secretary of State to request identical information from a pension fund holder where a person is in receipt of income support, SPC, jobseeker's allowance or employment and support allowance in order to determine whether a decision on an award of benefit should be revised or superseded.

55. At the relevant time, the tax and pensions regime in the case of capped drawdown was as follows:

(1) A pension fund holder could elect to receive an equivalent annuity that could be purchased with his drawdown pension fund. An 'equivalent annuity' was a level single-life annuity without a guaranteed term and was known as the 'basis amount'. The witness statement from Mr Shaw refers to this (at paragraph 17 of his statement - see page 254 of the Upper Tribunal bundle) as 'the form of annuity which would generally yield the highest income for the policyholder without depleting the fund's capital'. Therefore Mr Shaw is assuming that the fund's capital remains intact.

(2) Rule 5 of the Pension Rules in section 165 Finance Act 2004 (as amended) provided that the total amount of unsecured pension paid in each unsecured pension year in respect of a money purchase arrangement must not exceed 120% of the 'basis amount' for the unsecured pension year. If this limit was exceeded section 208 Finance Act 2004 imposed an unauthorised payment charge of 40%.

(3) The 'basis amount' for the unsecured pension year is the 'annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the member's unsecured pension fund immediately after the additional fund designation' (paragraph 10(6) Schedule 28 Finance Act 2004).

(4) The basis amount was calculated by applying to the fund hypothetical annuity rates set out in the GAD Tables. The vires for use of the GAD Tables for tax purposes is the Registered Pension Schemes (Relevant Annuities) Regulations 2006 (2006 No 129). The GAD rates were intended to approximate to market rates for a single life level annuity, the maximum being calculated at the outset, and at reviews every three years thereafter.

(5) Payments made under a purchased life annuity contract would always be taxed as the recipient's income by reason of section 422 Income Tax (Trading and Other Income) Act 2005. The effect of purchasing an annuity is, for tax purposes, to purchase an income stream.

56. The figure which is used by the Secretary of State as 'the maximum amount of income which may be withdrawn from a fund' was not, in fact, the figure calculated 'by means of' the GAD Tables. In the respondent's case the annual figure of £6,750 shown on form PPR1 was calculated by taking 120% of the 'basis amount' of £5,749. It was the figure of £5,749 which was established using the GAD Tables. As the evidence of Mr Shaw makes clear the GAD tables are based on annuity rates.

57. If, as Counsel for the appellant argued, the tax and pension rules were determinative of the 'maximum amount of the income which may be withdrawn from the scheme' the words in regulation 42(2A) of the Income Support (General) Regulations 1987, regulation 105(4) of the Jobseeker's Allowance Regulations 1996, and regulation 106(4) of the Employment and Support Allowance Regulations 2008 defining that amount would be unnecessary. I therefore reject this approach to the construction of the phrase.

58. In the absence of a definition in the 2002 Regs I am being asked by the appellant to 'read across' the definition from the regulations referred to in paragraph 52 above to regulation 18(3) of the 2002 Regs. As I pointed out in refusing to set aside my directions of 11 May 2017, the test for whether a Court will intervene by adding or omitting or substituting words in a statute was laid down by the House of Lords in *Inco Europe Ltd v First Choice Distribution (a firm) [2000] 1 All ER 586*. The House of Lords required the courts to be 'abundantly sure' of three matters:

(1) the intended purpose of the statute or provision in question;

(2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and

(3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

59. The same principles apply to delegated legislation (*Duo v Osborne (formerly Duo)* [1992] 1 WLR 611; *R (on the application of Kelly) v Secretary of State for Justice, Re Gibson* [2009] QB 204. I therefore need to be satisfied on the three matters set out by the House of Lords in *Inco*.

60. The first of the three *Inco* conditions, is to establish the intended purpose of the provision. In *BRG* Upper Tribunal Judge Turnbull summarised this as follows:

> *'The rationale for regulation 18 is that, in working out what a claimant should be paid by way of state pension credit in order to bring his income up to the guaranteed minimum, a claimant should be treated as possessing income which he has foregone'.*

61. At the second oral hearing I asked Counsel for the appellant if the instructions to the draftsman of the 2002 Regs were available and was told that they were not. I am not satisfied that the omission of a method of determining the 'maximum amount of income foregone' from regulation 18(3) was an error on the draftsman's part. I have no evidence that it was. The second of the three tests in *Inco Europe Ltd* is not fulfilled. I therefore decline to construe regulation 18(2) and (3) of the 2002 Regs other than in accordance with the plain meaning of the words used in the context in which they occur and taking into account the policy objective of the provision. I shall have no regard to the provisions of tax legislation as they can have no application in the context of SPC unless specifically incorporated into the SPC regime which they were not.

62. The written evidence from Mr Shaw (at pages 251 to 258 of the Upper Tribunal bundle) is that, in August 2013, under tax and pensions legislation the maximum permitted withdrawal from a capped income drawdown policy was 120% of the value of an annuity that could have been bought with a fund of the same value. Mr Shaw then sets out three alternative methods of calculation, two of which do not involve the notional purchase of an annuity. Option B (page 251 of the Upper Tribunal bundle) assumes that the policyholder will withdraw a fixed proportion of the fund each year *'increasing with age to use up 100 per cent of the fund's capital (and any generated interest) over the policyholder's projected lifespan'.*

63. In *Lillystone v Supplementary Benefits Commission (1982) 3 FLR 52* the Court of Appeal considered the question of whether the receipt by a widow of a set monthly sum over a period of ten years in exchange for the transfer of her house to the payer at the end of the period counted as income for supplementary benefit purposes. The Court agreed with the judge at first instance that the monthly payments were 'self-evidently a payment of capital by instalments'. In this regard Wien J had said:

> *'... it is a question of law whether a given resource is capable of being income as opposed to capital. Whether for the purposes of supplementary benefits receipts are of a capital character or income depends upon the*

precise nature of the transaction giving rise to the receipt. Payment of instalments of a capital sum are capital payments, and the receipts of such sums are receipts of capital and are not income. Income must consist of periodic receipts in the nature of additions to a person's wealth and must be capable of being expressed as weekly amounts. For example, half-yearly payments of interest in respect of a capital investment in a building society are to be regarded as income.

In my judgment, the receipt by the applicant of £70 per calendar month is incapable of being treated as income. It is self-evidently a payment of capital by instalments. Every time such a sum is received the outstanding balance of the original £8,500 goes down by an equivalent amount and the application has no immediate right to that balance. After 10 years, assuming the applicant lives that long, she has no realizable interest in the dwelling-house and no payment due from the solicitor who agreed to buy her house; so that the only realizable capital asset apart from savings certificates will have disappeared'.

((1981) 2 FLR 309 at page 315)

64. In the absence of a definition of the amount of income foregone and taking into account what Mr Shaw said about what he called Option B (summarised at paragraph 62 above) I agree with the FtT's reasoning that any sums withdrawn from the Plan at the relevant time would have been withdrawals of capital by instalments as the assets of the Plan were less than the respondent's initial investment. The fact that these withdrawals could be made periodically or from time-to-time does not alter matters.

…….

A L Humphrey

Upper Tribunal Judge

7 March 2018