

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 2 February 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 2 June 2017 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal. In accordance with the guidance set out below,

the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 13 December 2016 a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living component of PIP from 11 January 2017 to 13 October 2020. Following a request to that effect, the receipt of additional medical evidence from the appellant and the obtaining by the decision maker of a supplementary medical report, the decision dated 23 December 2016 was reconsidered on 26 January 2017 and was revised. The revised decision was that the appellant was entitled to the standard rate of both the daily living and mobility components of PIP from 11 January 2017 to 13 October 2020. An appeal against the decision of 23 December 2016 as revised on 26 January 2017 was received in the Department on 15 February 2017.
6. The appeal tribunal hearing took place on 2 June 2017. The appellant was present. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and substituted its own decision to the effect that the appellant was not entitled to either component of PIP from and including 11 August 2016.
7. On 17 November 2017 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 3 January 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 14 February 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was represented in the application by Ms Boland of the Law Centre (Northern Ireland). On 5 April 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations received on 30 April 2018, Mr Arthurs, for DMS, supported the application on seven of the grounds advanced on behalf of the appellant.
9. The written observations were shared with the appellant and Ms Boland on 1 May 2018. On 31 May 2018 written observations in reply were received from Ms Boland. The case became part of my workload in late 2018. On 6 March 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that the certain of the grounds of appeal, as outlined in the application for leave to appeal, were arguable.
10. On the same date I directed an oral hearing of the appeal. Following an earlier postponement the oral hearing took place on 16 May 2019. The appellant was not present but was represented by Mr Black of the Law Centre (NI). The Department was represented by Mr Arthurs. Gratitude

is extended to both representatives for their detailed and constructive observations, comments and suggestions.

Errors of law

11. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
12. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I)2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

Where the parties are in agreement

13. Mr Black and Mr Arthurs are in agreement that the decision of the appeal tribunal is in error of law on the basis of its approach to the potential applicability of certain of the descriptors and activities Parts 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 (‘the 2016 Regulations’). For example, in the case summary prepared for the oral hearing of the appeal, Mr Black has submitted that:

'The Appellant made the case in her application form that "My family deal with all this for me to avoid anxiety stress. I need coaxed and assisted and encouraged to focus." This is consistent with the Appellant's long term suffering from anxiety and depression, and engages descriptors 10(b) and (c). The Tribunal accepted that the Appellant suffered from anxiety and depression. However, the Tribunal did not engage with this activity at all or any of the descriptors within this activity.'

14. In case summary in response, Mr Arthurs submitted:

'The Tribunal failed entirely to consider this activity in its Reasons for Decision, therefore there are no reasons for their decision not to award points here. This amount to an error in law as the Tribunal has not adequately explained its decision.'

15. I agree with these submissions and, accordingly, agree that the decision of the appeal tribunal is in error of law. I also agree with the submissions and responses which have been made in respect of the other contested activities and descriptors.

The appellant's other grounds for appealing

16. Having found that the decision of the appeal tribunal is in error of law, I do not have to consider the appellant's other grounds for appealing. I wish, however, to make the following comments on certain of those grounds.
17. The first further ground concerns the important issue of an appeal tribunal substituting its own decision for that of the Department and, more particularly, making a decision which is less favourable to the appellant than the decision which had been made by the Department. In the instant case, and as was noted above, the Department's revised decision was to award an entitlement to the appellant of the standard rate of both the daily living and mobility components of PIP for a fixed-term period. The appeal tribunal's substituted decision was to disallow entitlement to either component of PIP.
18. In his Case Summary Mr Black made the following submissions on this issue:

'The Department awarded the standard rate of both mobility and daily living. The Appellant in her appeal sought to increase this to the enhanced rate of both mobility and daily living. The Department opposed the increase to enhanced rate, but took no issue with the award of standard mobility and daily living. The Department specifically asked the Tribunal to confirm the

standard award at para 8 of their submission to the Tribunal:

“8. I respectfully request that the tribunal confirms the decision dated 13-Dec-2016, notified on 15-Dec-2016, revised on 26-Jan-2017 that (the appellant) is entitled to Personal Independence Payment at Standard rate of Daily Living Component and Standard Rate of Mobility Component.”

The Tribunal therefore raised the removal of the standard rate of mobility and daily living of its own motion on the day of hearing. The Appellant had no notice prior to the hearing that this would be an issue on the appeal.

At the start of the appeal the Tribunal explained the powers of the Tribunal. However, the case law makes clear that this is insufficient notice to enable an Appellant to prepare a case on an issue which was not raised by the Department’s submission.’

19. Mr Black then made reference to the decision of the Upper Tribunal in *BTC v Secretary of State for Work and Pensions (PIP)* ([2015] UKUT 155 (AAC), (*BTC*)) setting out the facts of the case and citing what Upper Tribunal Judge Bano said at paragraph 7 of his decision. Mr Black then made the following additional submissions:

‘The facts in *BTC* are almost identical to the facts in the Appellant’s appeal and the concerns raised apply equally to the Appellant’s case. The Appellant had no notice prior to the hearing that removal of the award of standard rate mobility and daily living would be an issue and the Department’s submission provided strong basis to believe that it would **not** be an issue. In the circumstances it was procedurally unfair for the Tribunal to raise this issue on the day of hearing and remove the Appellant’s existing award. At the very least the Tribunal should have first adjourned the case to enable the Appellant to consider matters further and/or obtain appropriate medical or other evidence to address the concerns raised by the Tribunal.

It was insufficient for the Tribunal to explain its powers and offer an adjournment on the morning of hearing. Even if it does this, an appellant will still not at that stage have notice of the specific issues which the Tribunal intends to raise and in any event will not have had advance notice of those issues. Consequently, as noted in *BTC*, any decision by an appellant not to ask for an

adjournment is not fully informed (and it is unfair to put an unrepresented appellant in such a position).

The rules of procedural fairness will operate in almost all cases to require the Department to provide a submission to the Tribunal in advance of the hearing setting out its position. It is therefore unfair for the Tribunal to raise issues of its own motion on the morning of hearing without giving the appellant the advance notice that the Department would be required to give and which is necessary to enable proper preparation of the appellant's case. This is particularly so where the Department has specifically asked the Tribunal to confirm the standard award, thus indicating to the appellant that the standard award will not be in issue at the hearing.'

20. In his Case Summary, Mr Arthurs made the following submissions in reply:

'It remains my submission that the Tribunal gave (the appellant) sufficient notice of its intentions to consider her award of benefit and clearly explained the options that were available to her. (The appellant) decided that she did not wish to avail of the options but wished to proceed with the appeal, it is therefore my submission that the Tribunal has not erred as contended.'

21. In *DP-v-Department for Communities* (PIP) ([2020] NICom 1), I dealt with this issue in considerable detail. In paragraphs 23 to 3, and after reviewing my own decision in *C15/08-09 (DLA)* and the decision of Commissioner Stockman in *DM-v-Department for Social Development (DLA)* ([2010] NICom 335 ('*DM*')), I said the following:

'23. Except for some discussion about my disagreement with the original formulation of principle (x) in paragraph 61 of *C15/08-09 (DLA)* and my recasting of it, no doubt has been cast over the correctness of the principles in that decision or in *DM*. There are, accordingly, two aspects to the proper approach to the requirement that the appellant has had sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable.

24. The first is the need to draw the attention of the appellant, particularly an unrepresented appellant, to the appeal tribunal's powers and the appellant's options in light of those powers. That was what the practical guidance in paragraph 77 of *C15/08-09 (DLA)* was aimed at. The current President of Appeal Tribunals for Northern Ireland is to be commended for his proactive

approach to this aspect of the 'sufficient notice' requirement by formulating and implementing a policy whereby in every DLA appeal involving an existing award, the LQPM of the appeal tribunal will inform the appellant of the appeal tribunal's powers and the appellant's options in light of those powers, using words and phrases which mirror the guidance in paragraph 77 of *C15/08-09 (DLA)* and ask that the appellant signs a document indicating that they understand what they have been told and setting out how they wish to proceed by choosing one of three options. The options are (i) to withdraw the appeal (ii) to seek an adjournment in order to obtain further advice from a representative and (iii) to continue with the appeal with full knowledge of the powers available to the tribunal in relation to the existing award. Option (ii) appears to be only applicable to unrepresented appellants but even where an appellant has a representative a short adjournment might be necessary in order to allow for further consultation.

25. All of what is entailed in the described policy usually takes place at the start of the appeal and it might be thought that once an appellant, as in the instant case, chooses option (iii) and indicates a wish to continue with the appeal that that is the end of the matter and the 'sufficient notice' requirement has been met. It is not the end of the matter and this is where the principles in *DM* come in. Those principles are about the proper approach when the intention to consider the possibility of making a less favourable award is triggered in the appeal tribunal's mind by some aspect of the evidence. An appeal tribunal will not consider its assessment of the evidence until it has heard and seen all of the evidence. At the outset of an oral hearing of the appeal it will have some evidence before it, which is (i) usually that contained in the appeal submission, (ii) sometimes further evidence adduced by the appellant and (although I realise that this has become more problematic) the evidence contained in the appellant's General Practitioner (GP) notes. The appellant may, or as in the instant case, may not have seen and considered the evidence in the GP notes. The evidential framework is completed with the appellant's own oral evidence or evidence of any witness which they adduce.

26. It is possible that on pre-hearing perusal of the evidence, including the GP records, the appeal tribunal is alerted to evidence which signals the tribunal to the possibility that the existing award is not appropriate and triggers consideration of the possibility of making a less

favourable award. If that is the case, then the principles in *DM* mandate that the appellant is informed of that specific evidence and, as Commissioner Stockman put it, '... thereby be given an opportunity to consider whether he requires an adjournment for further evidence on the issue, or whether he might wish to withdraw the appeal.' When and how an appellant is alerted to what might be termed 'unfavourable' evidence noted in the pre-hearing perusal is for the appeal tribunal to decide in an individual case but caution needs to be exercised if the hearing begins with a presentation to the appellant of unfavourable evidence so as to prevent the impression that the appeal tribunal has made up its mind and forcing the appeal down the route of withdrawal.

27. It is equally possible that at the outset of the hearing, the tribunal has not identified any evidential basis to signal the tribunal to the possibility that the existing award is not appropriate but, rather, that evidence which is given during the course of the hearing – something said by the appellant or a witness, for example – which does provide an indication that the existing award is not appropriate and that a less favourable award is apposite. When that happens then the principles in *DM* are equally applicable. The tribunal's view on the relevance of the evidence to a potential review of the existing award needs to be put to the appellant in appropriate cautionary terms and, once again, the appellant must be given the opportunity to consider whether he/she wishes an adjournment to consider the evidence or to adduce further evidence or whether a withdrawal of the appeal is appropriate.

28. It is in this context that the interaction with the appellant at the start of the hearing is not the end of the matter. As was noted by Commissioner Stockman in *DM*, withdrawal during the course of an oral hearing is permitted by regulation 40 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999. It is my personal experience as a former LQPM that withdrawals have been sought during the course of an oral hearing, particularly by representatives, where evidence has been adduced which is suggestive that retention of an existing award is not appropriate. In those circumstances, however, and where a Departmental Presenting Officer is present, there exists the potential for a review of the correctness of the existing award through further Departmental decision-making. What may be necessary, however, is for the appeal tribunal to remind the appellant, during the course

of the hearing, in suitable and advisory terms about what was said about the appeal tribunal's powers and the appellant's options in light of those powers at the outset of the hearing.

29. Although conceding that it is remote, there is the possibility that the appeal tribunal is alerted to evidence which signals to the appeal tribunal that the existing award is not appropriate in the post-hearing assessment. As an example, the Medically Qualified Panel Member (MQPM) may have noticed something about the evidence of the appellant or on further perusal of the GP records, which could not be drawn to the attention of the other tribunal members during the course of the hearing. In those unusual circumstances, and where the appellant remains physically present in the tribunal venue, then the hearing may have to be recommenced in order that the newly-noted evidence is drawn to the appellant's attention.

30. All of this analysis and guidance takes on particular significance in 'existing award' appeals where the appellant is unrepresented. The general principle (ix) in paragraph 61 of *C15/08-09 (DLA)* states that appeal tribunals should refrain from making decisions less favourable to appellants than the decisions being challenged, except in the most obvious cases. In not so obvious cases, caution has to be exercised, particularly where the appellant is unrepresented to ensure that the appellant is alert to both aspects of the 'sufficient notice' requirement, where relevant. It is apparent, that through the development of the President's policy, as outlined above, that the first aspect is catered for. I set out below how the appeal tribunal in the instant case dealt with that requirement. That includes, however, a commendation of a specific paragraph in the statement of reasons concerning the approach taken. Care has also to be taken that the second aspect and the guidance set out in *DM* is applied in the proper manner. In this regard, however, and with respect to a submission which was made by Mr Black in the instant case, I do not accept, as a general principle, that in every case, where the appellant is unrepresented and the appeal tribunal is alerted to evidence that might trigger consideration of the possibility of making a less favourable award, that an adjournment is mandated. All will depend on the individual circumstances of a case but I can envisage that certain unrepresented appellants will have the capacity to address the appeal tribunal's concerns about specific evidence, adduce their own evidence in connection with

the issue and, where relevant, make a decision as to whether to seek an adjournment or withdraw the appeal.

31. Finally I have to say something about the proper approach in cases which are dealt with on the 'papers' alone. In sub-paragraph (vii) of paragraph 77 I stated that it was best and safest practice for appeal tribunals:

- '(vii) to ensure that in a case determined on the papers alone and, where the appeal tribunal is considering exercising its judicial discretion to make a decision which is less favourable to the appellant, that it is satisfied that an appellant has had sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable, which will be likely to involve adjourning the appeal, and providing an appropriate description of the appeal tribunal's powers and the appellant's options in light of those powers.'

32. Part of that guidance has been superseded by the extension of the President's general policy, applicable to oral hearings of appeals involving an existing award to parallel 'paper' hearings. I have been provided with a copy of a form which is sent to appellants, in cases involving an existing award, who have opted, through a separate exercise, to have their appeals determined without an oral hearing. The form contains information which is parallel to that given to appellants in parallel oral hearings and similar options are offered to them. There is, however, an additional option, which is to reverse the decision to opt instead for an oral hearing. It is creditable that appellants are informed that it is advisable that they do attend an oral hearing to provide their own oral evidence.

33. That deals with the first aspect of the 'sufficient notice' requirement. It does not address the second and what might be termed the '*DM*' requirement. Reviewing what was set out above about the proper approach to that requirement in oral hearings, the only additional evidence which might be before the appeal tribunal in 'paper' hearings is the appellant's GP records. It is unlikely that the appellant will have seen those records. In those circumstances, the guidance given above will be

appropriate. Each case will turn on its own individual circumstances. I am of the view, however, that where an appeal tribunal, hearing a case on the papers alone, and with the benefit of the appellant's GP records, is alerted to something within those records which signals the tribunal to the possibility that the existing award is not appropriate and triggers consideration of the possibility of making a less favourable award, then an adjournment, framed in appropriate terms, to allow the appellant to consider the issue and the evidence underlying it and to review his/her own options, including adducing further evidence, and perhaps their own at an oral hearing, seeking independent advice or withdrawing the appeal, is likely to be necessary.'

22. In paragraph 34 I confirmed that the principles in *C15/08-09 (DLA)* and *EM* apply to PIP. How were they applied in the instant case? As was noted above, Mr Black has submitted that the Department took no issue with the validity of the award which had been made by the decision of 13 December 2016. In support of this, he refers to paragraph 8 of a section of the submission prepared by the Department for the appeal tribunal hearing which is headed 'Questions for the Tribunal'. The contents of paragraph 8 have been set out above and I agree that read alone the paragraph is suggestive of support for the appropriateness of the award made by the decision of 13 December 2016. It is the case, however, that paragraph 8 has to be read in the context of the other paragraphs in the relevant section. Paragraph 9 reads as follows:

'Should the tribunal decide to make an award of Personal Independence Payment they should replace the decision of the decision maker dated 13 December 2016.'

23. The wording of this paragraph is suggestive of an awareness by the writer of the submission of the powers of the appeal tribunal to substitute its own decision for that of the appeal tribunal and make a different, more advantageous award to the appellant.

24. Paragraph 11 reads as follows:

'Should the tribunal decide to vary the award of Personal Independence Payment they should replace the decision maker dated 13 December 2016. The tribunal are respectfully asked to direct that any amount of Personal Independence Payment already paid to be treated as paid on account of the new award and any dispute as to the amount of offset to be returned to the tribunal for their decision.'

25. In turn, the wording of this paragraph is suggestive of an awareness by the writer of the submission of the powers of the appeal tribunal to

substitute its own decision for that of the appeal tribunal and make a different, and perhaps less advantageous award to the appellant.

26. I accept, however, that nothing much turns on this except that Mr Black has also asserted that the appellant, having made her appeal, and in advance of the appeal tribunal hearing, would have been unaware of the powers of the appeal tribunal to substitute its own decision for that of the Department and vary the award that was made by that decision. A careful reading of the appeal submission would have provided that information to the appellant.
27. The appellant attended the appeal tribunal hearing. She had no formal representative. There was a Departmental Presenting Officer present. The section of the record of proceedings for the appeal tribunal headed 'Documents Considered' includes the following entry:

'Form POT (OH) setting out the powers of the Tribunal and signed by (the appellant).'
28. 'Form POT (OH)' is the form which is utilised by appeal tribunals, as part of the extension to PIP by the President of Appeal Tribunals of the policy developed in relation to DLA and as set out above. A copy of the form referred to by the LQPM is in the file of papers which is before me and it is signed and dated on 2 June 2017 by the appellant and the LQPM.
29. In the substantive record of proceedings for the appeal tribunal hearing, the following is recorded:

'Explained the powers of the Tribunal to (the appellant).
She wished the appeal to proceed and signed the Form.'
30. There are no further entries in the record of proceedings or in the statement of reasons for the appeal tribunal's decision concerning the appeal tribunal's powers to substitute its own decision for that of the Department and make a decision which is less favourable to the appellant than the decision which had been made by the Department.
31. Although, the explanation which was given to the appellant during the course of the oral hearing is brief, I am satisfied that the appeal tribunal applied the principles in *C15/08-09 (DLA)* and aspects of *DM* in the proper manner in drawing the attention of the appellant to the appeal tribunal's powers and the appellant's options in light of those powers.
32. The appeal tribunal had the appellant's General Practitioner (GP) records before it. Although there is no note of that fact in the record of proceedings or the statement of reasons, I am informed that the appellant did not view her GP records at her own request. In the statement of reasons there is a section which is headed 'Information in the medical records about the main medical conditions.' In this section, the appeal tribunal summarises in some degree of detail extracts from

the appellant's GP records relevant to her various medical conditions. Much of this narrative is unproblematic but under the heading 'Mental Health' the following is recorded:

'There is no mention in that report of short-term memory loss.'

33. In addition, under the heading 'Gynae issues' it is noted that the appellant had attended a clinic in May 2012. The following was also recorded:

'She was ... prescribed medication but does not appear to be on medication now.'

34. In the section of the statement of reasons dealing with mobility, the appeal tribunal has stated:

'She reported short term memory loss. As already noted, there is no record of a diagnosis of memory loss and no referral for any investigation or testing.'

35. In the section of the statement of reasons dealing with managing toilet needs or incontinence, the appeal tribunal has stated:

'(The appellant) has some urinary incontinence. She wears pads which she buys. She has not been referred to the Continence Clinic. Use of an aid – Descriptor (b) = 2 points.'

36. It is clear, therefore, that the appeal tribunal relied on evidence contained within the GP records in arriving at its conclusions as to aspects of the mobility and daily living activities. Recalling that the appellant did not look at her GP records, the appeal tribunal, as was mandated by *DM*, was obliged to put the relevance of the evidence to a potential review of the existing award to the appellant in appropriate cautionary terms and, is necessary, give the appellant the opportunity to consider whether she wished an adjournment to consider the evidence or to adduce further evidence or whether a withdrawal of the appeal is appropriate. In the relevant record of proceedings there is a narration of exchanges between the appeal tribunal and the appellant concerning her memory loss and her gynaecological problems. During that exchange there is reference to what was said by the appellant's GP, or rather not said about memory loss and the appeal tribunal took the appellant's own evidence concerning gynaecological issues. The only minor aspect of those exchanges is that the appellant made reference to 'taking a tablet' for 'urinary problems' which is not referred to by the appeal tribunal. That is not material, however, as the appeal tribunal did not alter the points which had been awarded by the decision maker for the activities of planning and following journeys and managing toilet needs or

incontinence where the appeal tribunal had relied in its reasoning on evidence from the GP records.

37. I turn to the submission made by Mr Black on the applicability of the decision of Upper Tribunal Judge Bano in *BTC*. In *BTC*, the appellant had been awarded the mobility component of PIP at the standard rate, but had been refused an award of the daily living component at either rate. She appealed to the First-tier Tribunal which removed the entitlement to the mobility component and confirmed the refusal decision in connection with the daily living component. In the statement of reasons for its decision, the Tribunal noted the following:

'Mr R appeared on behalf of the Secretary of State and indicated that the Appellant was in receipt of carer's benefit which may be affected by any decision the Tribunal took today. The Tribunal, itself, having considered the papers in advance felt bound to advise the Appellant that the existing standard rate award may be at risk in the event that the Tribunal took an adverse decision and suggested to the Appellant that she may wish to consider withdrawing her appeal in order to safeguard the existing award. This was explained to her at some length. It was suggested that she may wish to obtain proper representation. In the event, she declined to reconsider the matter or to obtain representation and wished to proceed with appeal and the hearing.'

38. The Tribunal then provided the following reasons for its decision to remove the mobility component:

'The Tribunal ... had significant concerns as to the Appellant's lack of credibility with regard to her claims for mobility. She was able to walk around hospital departments and although she stated that she could walk more than 20 m. she preferred to walk less than that distance because of the subsequent effect it would have on her. She sat at the hearing for 45 minutes and without difficulty and albeit not then standing was able to walk out of the room without difficulty. The least credible aspect of her evidence was her claim that her walk to her GPs would be around 28 m which was coincidentally the same distance as observed by the Health Consultant. The Tribunal did not believe her that the GP surgery was as close to her home. It is a matter of judicial knowledge (albeit not put to her) that the distance between her home and Clydebank Health centre where her GP is situated by taking the shortest route would be in the order of 2 miles. She took a caravan holiday in Skye. It was inconceivable that in doing so she did not walk. In the circumstances the award under 2(c) for mobility is regarded by the

Tribunal as singly inappropriate and in view of her plantar fasciitis substituted an award under 2(b) in its stead [“can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided”].’

39. The appellant was given permission to appeal to the Upper Tribunal. Upper Tribunal Judge Bano stated the following, at paragraphs 7 and 8 of his decision:

‘7. However, the point I want to make is this. A number of disability living allowance decisions have drawn attention to the pitfalls of tribunals making decisions which are less favourable to a claimant than the decision under appeal. Even if the issue which the tribunal takes upon itself to consider is one which is raised by the appeal (which it was in this case) and the claimant is given an adequate opportunity of considering whether to proceed with the appeal, the claimant will not have had advance notice of the issue, as would be the case if the Secretary of State had been required to give grounds for opposing the appeal under Rule 24(2)(e) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008. In *R(IB) 2/2004* it was held that a claimant had to be given sufficient notice to enable the claimant to prepare his or her case on the new issue and, if the issue is not dealt with in the submission to the tribunal, it may be extremely difficult for the tribunal to give the claimant sufficient notice of the issue without appearing to compromise its independence. In *CDLA/884/2008* it was said:

“Tribunals need to be aware of the dangers of being both prosecutor and judge, one of which is the risk of making errors unprompted by the parties. Such errors are too common and are contributing significantly to the caseload of the CommissionersThere are other risks in being both prosecutor and judge. The most obvious is that there can be a perception that the tribunal has prejudged the case ... a tribunal is in a difficult position. If it gives the claimant too robust a warning at the beginning of the hearing, it runs the risk of giving the impression of having prejudged the case. If it does not give such a robust warning, the warning may not adequately convey to the claimant the case he or she needs to consider resisting with the consequence that a decision not to withdraw the appeal, or not to ask for an

adjournment, is not fully informed. This is a powerful reason for tribunals refraining from making decisions less favourable to claimants than the decisions being challenged, except in the most obvious cases (e.g. where the evidence is overwhelming or the facts are not in dispute and no element of judgment is involved or where the law has been misapplied by the Secretary of State) or after an appropriate adjournment.”

8. Speaking for myself, I can see no reason why the tribunal in this case should have wanted to consider whether the award of mobility component was over-generous. The claimant’s case for an *increase* in her award was moderately and cogently argued and consistent with the independent medical evidence. The award of descriptor 2(c) by the Health Care Professional was fully reasoned, even if the claimant did challenge it on the ground that Regulation 4 of the PIP Regulations was not taken fully into account. Be that as it may, the tribunal’s decision to consider on its own initiative whether to remove mobility component led to precisely the kind of unprompted error envisaged in *CDLA/884/2008*. The tribunal’s failure to invite the claimant to put her case with regard to the distance from her home to her G.P.’s surgery and with regard to what she did while on holiday, when she could not possibly know that those matters would be crucial to the tribunal’s decision, deprived the claimant of the opportunity to correct any errors by the tribunal and amounted to serious breaches of the requirement of fairness.’

40. As was noted above, Mr Black has submitted that the comments of Upper Tribunal Judge Bano are authority for the principle it was insufficient for the appeal tribunal to explain its powers and offer an adjournment on the morning of hearing and that even where the appeal tribunal does this, an appellant will still not, at that stage, have notice of the specific issues which the appeal tribunal intends to raise and will not have had advance notice of those issues. Consequently ‘... any decision by an appellant not to ask for an adjournment is not fully informed (and it is unfair to put an unrepresented appellant in such a position).’
41. Further, Mr Black has asserted that the principles in *BTC* are authority for the principle that it was procedurally unfair for the appeal tribunal to raise the issue of its powers to substitute its own decision for that of the Department and, thereby make a less favourable decision on the day of hearing. Further, the appeal tribunal ‘should have first adjourned the case to enable the Appellant to consider matters further and/or obtain

appropriate medical or other evidence to address the concerns raised by the Tribunal.’ This appears to amount to a submission that in every case, where the appellant is unrepresented and the appeal tribunal is alerted to evidence that might trigger consideration of the possibility of making a less favourable award, that an adjournment is mandated. That is not a principle which I was minded to accept in *DP* and in that case, I stated, at paragraph 30:

‘All will depend on the individual circumstances of a case but I can envisage that certain unrepresented appellants will have the capacity to address the appeal tribunal’s concerns about specific evidence, adduce their own evidence in connection with the issue and, where relevant, make a decision as to whether to seek an adjournment or withdraw the appeal.’

42. Mr Black noted that the Department was obliged to provide a written submission for the appeal tribunal hearing and that it was (i) ‘unfair for the Tribunal to raise issues of its own motion on the morning of hearing without giving the appellant the advance notice that the Department would be required to give and which is necessary to enable proper preparation of the appellant’s case’ and (ii) ‘this is particularly so where the Department has specifically asked the Tribunal to confirm the standard award, thus indicating to the appellant that the standard award will not be in issue at the hearing.’
43. I have already addressed issue (ii) above in noting that once the Department’s statement concerning ‘confirmation’ of the existing award was set in its proper context that a careful reading of the appeal submission would have provided that the appellant was informed, in advance of the oral hearing, that the appeal tribunal had the power to substitute its own decision and make both an alternative favourable or unfavourable decision.
44. As to (ii), a significant context for the comments of Upper Tribunal Judge Bano was the applicability in Great Britain of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (‘the 2008 Rules’), as amended, and, in particular rule 24(2)(e). Rule 24 is concerned with a requirement for the respondent to an appeal to provide a response to an appeal made under rule 23. Rule 24(2) sets out certain requirements for such a response and rule 24(2)(e) provides that one of those requirements is that the respondent must state whether ‘the decision maker opposes the appellant’s case and, if so, any grounds for such opposition which are not set out in any documents which are before the Tribunal.’ There is no parallel rule in the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland 1999, as amended, and I distinguish the decision in *BTC* on that basis alone.
45. There is a further basis on which I would distinguish the decision in *BTC*. As was noted above, in paragraph 7 Judge Bano stated:

'In *R(IB) 2/2004* it was held that a claimant had to be given sufficient notice to enable the claimant to prepare his or her case on the new issue and, if the issue is not dealt with in the submission to the tribunal, it may be extremely difficult for the tribunal to give the claimant sufficient notice of the issue without appearing to compromise its independence.'

46. With respect to Upper Tribunal Judge Bano, I am not sure that this is what was what the Tribunal of Commissioners did hold in that decision. In fact, they had little to say about the exercise of 'sufficient notice' requirements. In paragraphs 93 and 94, the Tribunal of Commissioners stated:

'93. Fifth, the "strong" guidance which CPAG submits that we should give in relation to exercise of the tribunal's discretion in section 12(8)(a) is that it would "normally" be inappropriate for the tribunal to consider superseding an award adversely to the claimant when the Secretary of State did not. However, any such guidance would in our judgment be so vague as to be of no assistance, since it would give no real indication as to when it would be appropriate for the tribunal to exercise its discretion to consider superseding adversely to the claimant when that was not in issue in the appeal. The discretion is one to be exercised judicially, taking into account all the circumstances of the particular case. We do not think it appropriate or helpful to attempt to formulate guidance as to the exercise of the discretion.

94. There must, however, be a conscious exercise of this discretion and (if a statement of reasons is requested) some explanation in the statement as to the reasons why it was exercised in the manner it was. In exercising the discretion, the appeal tribunal must of course have in mind, in particular, two factors. First, it must bear in mind the need to comply with Article 6 of the Convention and the rules of natural justice. This will involve, at the very least, ensuring that the claimant has had sufficient notice of the tribunal's intention to consider superseding adversely to him to enable him properly to prepare his case. The fact that the claimant is entitled to withdraw his appeal any time before the appeal tribunal's decision may also be material to what Article 6 and the rules of natural justice demand. Second, the appeal tribunal may consider it more appropriate to leave the question whether the original decision should be superseded adversely to the claimant to be decided subsequently by the Secretary of State. This might be so if, for example,

deciding that question would involve factual issues which do not overlap those raised by the appeal, or if it would necessitate an adjournment of the hearing.’

47. As to the endorsement of *CDLA/884/2008* and the principle that there is a ‘powerful reason for tribunals refraining from making decisions less favourable to claimants than the decisions being challenged, except in the most obvious cases’, as was noted above, in *C15/08-09 (DLA)* I indicated my respectful disagreement with aspects of the decision in *CDLA/884/2008*. The justification which I gave for the departure was set out in paragraphs 63 and 64 of my decision in *C15/08-09 (DLA)* as follows:

‘63. Why would I reformulate this principle? Elsewhere in *R(IB)2/04*, the Tribunal of Commissioners in Great Britain had noted that

‘32. Appeal tribunals are part of the adjudication system which is designed to ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled (as opposed to the benefits to which the parties may be contending that they are entitled). There is a legitimate public interest in ensuring such a result. The jurisdiction has thus been described as inquisitorial or investigatory (see, in particular, *R(IS) 5/93* and the authorities cited in paragraph 14 of that Commissioner’s decision). Such a jurisdiction generally extended to include a duty on the tribunal to consider and determine questions which are necessary to ascertain the claimant’s proper entitlement, whether or not they have been raised by the parties to an appeal (*R(SB) 2/83*). In our judgment, in the light of the above and the reasons given by Mr Commissioner Jacobs in paragraphs 17 and 18 of decision *CH/1229/2002*, “raised by the appeal” in section 12(8)(a) is to be interpreted as meaning actually raised at or before the hearing by at least one of the parties to the proceedings. Section 12(8)(a) therefore does not limit the overall jurisdiction of an appeal tribunal, but grants it a discretion as to the extent to which it exercises this inquisitorial role. That discretion must be exercised judicially. An appeal tribunal is

under a duty to consider whether or not to exercise the discretion where the circumstances could warrant it and would err in law by failing to do so or by failing to give adequate reasons for its conclusion. However, it will not err in law if, following a proper judicial exercise of its discretion, it decides not to consider issues not raised by the parties to the appeal.'

64. In my view, the duty on an appeal tribunal to ensure that a claimant 'receives neither more nor less than the amount of social security benefit to which they are properly entitled' includes a requirement to undertake a full investigation of the validity of an existing award and determine whether that award is correct. It is not sufficient, in my view, to leave the issue in abeyance, and undertake an artificial remission to the Department.

48. The second further ground on which I wish to comment was set out by Mr Black in his case Summary as follows:

'Ground of Appeal 2. It is submitted that the tribunal has erred in law by committing a procedural unfairness in relation to the treatment of evidence.'

The Appellant provided further evidence to the Healthcare Professional for reconsideration, including hospital letters, GP comments and a medication list. The Healthcare Professional considered these and increased the award.

At hearing, the Tribunal stated that it did not have either the hospital letters or GP comments but "*decided to proceed without the additional medical evidence referred to in 6 as (the Tribunal) had the medical records and all relevant information would be contained there.*"

It is therefore not clear whether the Tribunal viewed the material which was made specifically available to the Healthcare Professional for the reconsideration which led to an increased award. The Tribunal should not have proceeded until it had access to all the material which was made available to the Healthcare Professional, particularly when that material led to an increase in award. This was a particularly serious failing by the Tribunal.

The Tribunal also examined the GP Notes and Records but the Appellant did not have an opportunity to view these. This was procedurally unfair, particularly in

circumstances where the Tribunal did not view the material provided to the Healthcare Professional for reconsideration, and instead relied on the Notes and Records.’

49. In his Case Summary, Mr Arthurs made the following submissions in response:

‘The Tribunal did not take the opportunity to seek all the relevant information possibly provided to the Healthcare Professional. Failure to do this was disadvantageous to the appellant. The Tribunal has also not indicated if they gave the appellant an opportunity to review the medical information available to them. The Tribunal therefore has erred in law on this issue.’

50. In relation to the third ground of appeal, I have noted that the Mr Black has confirmed that he was resiling from any argument concerning the lawfulness of amendments made to the 2016 Regulations. He did request, however, that I confirm the applicability in Northern Ireland of the decision of the three-judge panel in *MH v Secretary of State for Work and Pensions (PIP)* ([2016] UKUT 531 (AAC), [2018 AACR 12, (*MH*)). I decline to do so as the decision in *MH* is an important one and anything which I might say in this case about its applicability in Northern Ireland would obviously be *obiter*.

Disposal

51. The decision of the appeal tribunal dated 2 June 2017 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
52. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
- (i) the decision under appeal is a decision of the Department dated 13 December 2016, as revised on 26 January 2017 in which a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living component and the standard rate of the mobility component of PIP from 11 January 2017 to 13 October 2020;
 - (ii) the appellant will wish to consider what was said at paragraph 77 of *C15/08-09 (DLA)* concerning the powers available to the appeal tribunal and the appellant’s options in relation to those powers;
 - (iii) the Department is directed to provide details of any subsequent claims to PIP and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is

directed to take any evidence of subsequent claims to Disability Living Allowance into account in line with the principles set out in *C20/04-05(DLA)*;

- (iv) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and
- (v) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

21 January 2020