

**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 4 February 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. The decision of the appeal tribunal dated 4 February 2022 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 set aside the decision of the appeal tribunal with a degree of reluctance. This is because of the careful and forensic approach by the appeal tribunal to many of the substantive issues arising in the appeal and its judiciously prepared statement of reasons. Nonetheless, I am satisfied that the appeal tribunal has committed or permitted a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings.
3. For further reasons set out below, 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.

4. 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.
5. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his 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**

6. On 24 October 2018 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 13 August 2018. Following a request to that effect, the decision dated 24 October 2018 was reconsidered on 13 January 2019 but was not changed. An appeal against the decision dated 24 October 2018 was received in the Department on 6 February 2019.
7. The appeal tribunal hearing took place on 10 October 2019. The appellant was present, was accompanied by his wife and was represented. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision dated 24 October 2018.
8. On 30 June 2021 Commissioner Stockman found that the decision of the appeal tribunal was in error of law and set it aside. He remitted the appeal to a newly constituted appeal tribunal for rehearing.
9. The further appeal tribunal hearing took place on 4 February 2022. The appeal proceeded by way of a 'paper' hearing. The appellant had completed and signed a form on 21 November 2021 in which he ticked a box to indicate that:

'I wish to have my appeal dealt with by way of a paper determination and I understand that by choosing this option I will not be notified in advance of the date that my hearing will take place, but I will be notified in writing of the outcome of the appeal.'
10. The form is date-stamped as having been received in the Appeals Service (TAS) on 30 November 2021.
11. The appeal tribunal of 4 February 2022, by a majority, disallowed the appeal and confirmed, in substance, the Departmental decision of 24 October 2018.

12. On 2 March 2022 correspondence from the appellant, itself dated 25 February 2022, was received in TAS. In this correspondence, the appellant stated:

‘I have received a decision from you that on 4/02/22 my appeal was disallowed. It states on the decision that it was a paper hearing and that I was not present, I request that you set aside this decision to allow me either to be present at (I attended the previous hearing) or represented, or both? I received no notification that my appeal was being heard. If I made a mistake by taking an incorrect box on the form I returned to you, I can only apologise. If you cannot set your decision aside please forward to me copies of the record of proceedings and reasons for the tribunal's decision.’

13. The correspondence was treated as a formal application to set aside the decision of the appeal tribunal under Regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland 1999, as amended (‘the 1999 Regulations’). On 11 July 2022 the President of Appeal Tribunals for Northern Ireland and a Legally Qualified Panel Member (LQPM) determined that the application to set aside should be refused.
14. On 14 September 2022 an application for leave to appeal to the Social Security Commissioner was received in TAS. The appellant was represented in this application by Mr Gibson. On 28 November 2022 the application was refused by the LQPM.

### **Proceedings before the Social Security Commissioners**

15. On 16 January 2023 a further application for leave to appeal was received in the office of the Social Security Commissioners. Once again, the appellant was represented by Mr Gibson.
16. On 30 January 2023 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 28 February 2023, Mr Killeen, for DMS, supported the application for leave to appeal.
17. The written observations were shared with the appellant and Mr Gibson on 4 May 2023.
18. On 4 May 2023 I granted leave to appeal. In granting leave to appeal I gave as a reason that it was arguable that the appeal tribunal had committed or permitted a procedural or other irregularity capable of making a material difference to the outcome or fairness of the proceedings. On the same date I determined that an oral hearing of the appeal would not be required.

## Errors of law

19. 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?
20. 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; ...
21. 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.”

## Analysis

22. In the application for leave to appeal, Mr Gibson submitted that the appeal tribunal erred in law by failing to consider whether to adjourn the hearing to permit the attendance of the appellant and for him to give oral evidence, in spite of his stated wish to have the appeal decided by way of a ‘paper’ hearing. In support of that submission, Mr Gibson referred to the following three decisions of the Administrative Appeals Chamber (AAC) of the Upper Tribunal:
- *MM v SSWP (ESA)* [2011] UKUT 334 (AAC) (‘*MM*’)
  - *JP v SSWP (IB)* [2011] UKUT 459 (AAC) (‘*JP*’)

- *SW v SSWP (ESA)* [2012] UKUT 76 (AAC) ('SW')

23. In *MM* the appellant had also indicated on the parallel enquiry for in Great Britain that he did not wish to have an oral hearing of his appeal. The analysis undertaken by Upper Tribunal Judge Mesher is significant, but it has to be considered in its proper context. Upper Tribunal Judge Mesher said the following in paragraphs 6 to 9 of his decision:

6. Rule 27(1) of the First-tier Tribunal Rules is as follows:

"(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—

- (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
- (b) the Tribunal considers that it is able to decide the matter without a hearing."

None of the other paragraphs of rule 27 impinge on that duty in the case of final decisions on appeals outside the criminal injuries compensation jurisdiction. Under rule 1(3) "hearing" means an oral hearing, including video links and other forms of instantaneous two-way electronic communication.

7. What the Chamber President said in paragraph 8 of *VAA*, a case about a refusal to admit a late appeal or to extend time, was this:

"The decision of 8 December 2008 by the Tribunal Judge noted in paragraph 7 that [rule] 27(4) of the Rules ... permitted him to make a decision which disposed of the proceedings without a hearing. The decision notice of 8 December 2008, however, does not state this. Moreover it gives no reasons for concluding that it was right to take the decision without a hearing. The Tribunal Judge presumably thought there was no good reason for a hearing. If so, in the circumstances of the present case, he ought to have explained why."

Rule 27(4) gives a more general discretion to a First-tier Tribunal in a criminal injuries compensation case to make a decision disposing of the proceedings without a

hearing and does not impose a primary duty to hold a hearing as rule 27(1) does.

8. The view taken on behalf of the Secretary of State in the submission of 13 June 2011 was that, especially as the tribunal found that the claimant's ESA50 questionnaire was very sparsely completed and somewhat vague, it had erred in law by failing to consider whether to adjourn for further medical evidence having taken account of the overriding objective of dealing with cases fairly and justly (rule 2). The representative relied on the decision of Judge Lane in *AT v Secretary of State for Work and Pensions (ESA)* [2010] UKUT 430 (AAC), which had itself relied on the decision of Judge Jacobs in *MH v Pembrokeshire County Council (HB)* [2010] UKUT 28 (AAC).
9. I prefer not to enter into the questions of the relevance of the overriding objective to the factors to be taken into account when a tribunal is deciding whether or not to adjourn and of when the exercise of that discretion might involve an error of law that justifies the setting aside of the tribunal's decision. I see the error of law in the present case in the inadequacy of the tribunal's reasons in failing to show that it had considered either the conditions in rule 27(1) for proceeding without a hearing or whether or not to adjourn to give the claimant an opportunity to attend or to produce further medical evidence.'
24. The proper context for the analysis in *MM* is rule 27 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ('the 2008 Rules'). Those Rules do not apply in Northern Ireland and, accordingly, I distinguish the analysis in *MM* to the extent that it relies on Rule 27. Nonetheless, I accept that the decision also addresses more general principles relating to the duty on an appeal tribunal to consider whether it is appropriate for an appeal to be determined without an oral hearing, even though the appellant has opted for a paper hearing.
25. This is confirmed by what Upper Tribunal Judge Lane stated in paragraphs 6 to 8 of *SW*:

'6. At the oral hearing, we noted that this was a determination of an appeal on the papers. This is not mentioned in the Statement of Reasons, it misled the Secretary of State's representative and reveals a further error of law: the tribunal failed to exercise its discretion as to whether to proceed with a paper determination.

7. By now, tribunals should be more than aware of Rule 27(1) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008, which makes it clear that there must be an oral hearing unless ....(b) *the Tribunal considers that it is able to decide the matter without a hearing.*

**If the rule alone was not enough to convince the tribunal, the Upper Tribunal decisions in *MM v SSWP* [2011] UKUT 334 (AAC), *AT v SSWP* (ESA) [2010] UKUT 430 (AAC) ('AT') and *MH v Pembrokeshire County Council* [2010] 28 (AAC) should. These cases indicate that, even though an appellant has opted for a paper hearing, it is necessary for the tribunal to consider actively whether the appeal can be determined without a hearing.**

26. The emphasis here is my own. Upper Tribunal Judge Lane also made the decision in *AT*. She said the following in paragraphs 12 to 15:

'12. In this appeal, there was evidence that the tribunal did consider whether it was appropriate to proceed on the papers, as can be seen in the signed declaration on the pro-forma Record of Proceedings for paper cases used at the time the appeal was heard. This states:

'I am satisfied that it is proper to proceed to decide the appeal on the papers.'

The pro-forma was produced for the purposes of regulation 39(5) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 which applied to the hearing of paper cases before the new procedure rules came into force on 3 November 2008. There are differences between the old regulation and rule 27. As the appellant's representative pointed out, under regulation 39(5) the decision whether to proceed was for the tribunal judge alone whereas under rule 27 the decision is for the tribunal as a whole. In practice, however, a tribunal judge would take the decision whether or not to proceed after consultation with the other tribunal members. In these circumstances, it seems to me that the tribunal judge's declaration is, for all intents and purposes, a declaration relating to the tribunal as a whole. Another difference is that under the old regulation the question was whether it was 'proper' to proceed whereas under the new rule the question is whether the tribunal is able to decide the matter without a hearing. But the gist is the same: can the appeal be decided properly, or in other words, fairly and justly, on the papers? The signed declaration shows that the tribunal applied its mind to that question.

13. The First-tier Tribunal of the Social Entitlement Chamber abandoned the use of a Record of Proceedings for paper hearings in April 2010. Since then, there is nothing to show that a tribunal which conducts a paper hearing has addressed its mind to the relevant rule or the overriding objective unless the tribunal judge issues a Statement of Reasons which explains this.

**14. The [First-tier Tribunal Procedure Rules] have not changed a tribunal's duty to give adequate reasons for its decision. A failure to explain expressly (or impliedly) why a discretion was exercised in a particular way may, therefore, involve an error of law. This would leave the tribunal's reasons open to attack for inadequacy. A bald statement that `the tribunal have considered the overriding objective in deciding to proceed on the papers is unlikely to be enough if there were obvious factors which pointed the other way. The tribunal would then need to do more to show how it balanced the factors in deciding to go ahead.**

15. Whether the lack of reasons on this issue would be an error of sufficient gravity to warrant setting the decision aside would depend on all the circumstances of the appeal. The error might be seen as immaterial if any tribunal acting rationally would have heard the case on the papers. Moreover, section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 does not require the Upper Tribunal to set aside a decision of the First-tier Tribunal, even if there is an error of law.'

27. Once again, the emphasis here is my own.

28. In *JP*, Upper Tribunal Judge Poynter said the following at paragraphs 11-20:

**'The decision not to hold a hearing**

11 As paragraphs 1 and 2 of the statement explain, the tribunal's decision was made on consideration of the papers without a hearing. The claimant had requested that procedure, as had the Secretary of State.

12 The statement shows the tribunal knew that, even in the light of those requests, it had to hold a hearing unless it considered that it was able to decide the matter without one (see rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ('the Rules') and the recent decision of Judge Mesher in *MM v SSWP (ESA)* [2011] UKUT 334 (AAC)). I am



satisfied that the tribunal consciously exercised its discretion to proceed without a hearing.

- 13 However, whether the tribunal has given adequate reasons for the exercise of that discretion is a more difficult issue.
- 14 The effect of rules 2 and 27(1)(b) of the Rules is that the tribunal could not have proceeded on the papers unless it “felt that [it was] able to deal with the appeal fairly and justly in accordance with the overriding objective”. For the tribunal to say, without more, that that is the case is to re-state its decision to proceed in different words, rather than to explain it. It amounts to saying that the tribunal decided to proceed because it formed the view that the criteria which permit it to do so are satisfied. However, in my judgment, what is required by the decision in *MM v SSWP (ESA)* is an explanation, however brief, of why the tribunal concluded those criteria are satisfied.
- 15 Some explanation can be found in the observation (at paragraph 1 of the statement) that the claimant is an “experienced appellant who had been successful in at least two previous appeals”. I can understand why the claimant has objected to that passage, which she regards as derogatory and as implying that—as she had been successful in two previous appeals—she was overdue for a failure on this occasion. However, I am sure that is not what the tribunal meant. Rather, the tribunal was recording that it was dealing with someone who was not new to the appeals process and who could therefore be expected to make an informed choice about whether she wished to attend a hearing. That is not true of all appellants and, in my judgment, the tribunal was entitled to take it into account. If there were no other relevant factors, I would have held that the tribunal’s explanation of its decision to proceed was, just, adequate.
- 16 The real problem with the tribunal’s explanation in this case is that, having decided to proceed, it then preferred the evidence of Nurse P to that of the appellant because (among other things) the appellant was absent from the hearing.
- 17 I do not understand how the appellant’s absence from a hearing could be a legitimate reason for rejecting her written evidence and preferring the written evidence of another witness who was also absent. It seems to me

that this is another manifestation of the flawed approach to the evidence that I discuss in the next section of this decision.

- 18 However, if one assumes for the purpose of argument that it was legitimate for the tribunal to adopt that approach to the evidence, it needed to explain in greater detail how it concluded that it could deal with the appeal fairly and justly without a hearing. It must have considered that Nurse P's evidence raised issues that the appellants might have been able to explain had she been present. If not, why did it say that it was preferring Nurse P's evidence "in the absence of the appellants"?
  - 19 But if the tribunal did take that view, why did it not consider that fairness and justice required it to give the claimant an opportunity to attend a hearing and give that explanation? In *Gillies v SSWP* [2006] UKHL 2 at [41] Baroness Hale of Richmond observed that "the system [i.e., the system of social security adjudication] is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less". Holding a hearing of an appeal is something the tribunal "can" do and if Nurse P's evidence raised issues that required explanation, arranging for that explanation to be given was the best way of ensuring that the claimant received what she is entitled to, neither more nor less. The claimant had not said that she would not attend a hearing if the tribunal decided to hold one: she had only said that she did not herself wish to have a hearing. If she had been contacted to say that the tribunal felt it was necessary to hold a hearing and had replied that she would not attend in any event, the position would have been different. However, there is no evidence before me that any such contact was made.
  - 20 In summary, the tribunal's reasons for deciding not to hold a hearing were inadequate, given that it treated her absence as an adverse factor in the weighing of her evidence. That is an error of law.'
29. I turn to the jurisprudence from Northern Ireland. In *C6/05-06(1B)* Mrs Commissioner Brown said the following, at paragraphs 13 60 16:
- '13. I am in agreement with Ms Fleming that there is nothing in the reasoning to indicate the tribunal was unaware of its powers to adjourn nor was there any need for the tribunal to expressly refer to those powers to indicate it was aware of them. I would not usually regard

a tribunal as having erred in law because no mention is made in its decision of any consideration of adjourning because there will not usually be any reason why a tribunal should adjourn a case where a claimant has chosen to have his appeal determined on the papers. As Mr Commissioner Rowland stated in CDLA/1347/1999 at paragraph 12:

“Of course, he [the claimant’s representative] is right that mere non-attendance at a hearing is not, by itself, a ground for dismissing an appeal. However, if a claimant does not attend a hearing, the tribunal cannot obtain from him or her the answers to any questions that they feel are raised by the evidence. In some cases, they may conclude that the claimant has not attended for the specific purpose of avoiding having to answer such questions and so they may draw an adverse inference against the claimant. In other cases, of which this is one, the tribunal is simply left in ignorance as to what the answers might be and whether they might have strengthened the claimant’s case. In my view, a tribunal are perfectly entitled to make a comment to that effect in their reasoning. That is all that was being stated in the present case. If a tribunal are wholly unable to do justice without there being an oral hearing, they ought to adjourn the proceedings and direct that there be one, but in a case where a claimant has had notice of the relevant issues and has deliberately elected not to seek an oral hearing, as happened in this case, a tribunal are generally entitled to take the view that the claimant has had sufficient opportunity to put his or her case, even though there is a possibility that oral evidence might have strengthened it.”

14. I consider that there is nothing in the remarks of the instant tribunal other than those of the type indicated by Commissioner Rowland and that there is nothing to indicate that the tribunal operated in any way in ignorance of its powers to consider adjournment.

15. I come then to decide whether there was anything which should have indicated that the tribunal should have considered adjourning. In this connection Mrs Carty

placed some emphasis on decision CDLA/1552/1998. I am in agreement with Commissioner Williams where he states that a tribunal conducting a paper hearing because the claimant has not requested an oral hearing is not bound to decide the appeal only on the papers. I am also in agreement with him that:

“... the waiver by a claimant of the right to an oral hearing is not the only determinant that the appeal will have a paper hearing. ...”  
[Paragraph 10]

16. However the fact that the claimant has not sought an oral hearing is a factor which must be taken into consideration. I am also in agreement with Commissioner Williams that fairness may “in some cases” require that there be an oral hearing even when the claimant does not ask for one. I do not consider that the tribunal need even consider adjourning unless there is something to indicate that the appeal should not be heard on the papers. It therefore follows that unless there is some such indication the tribunal need not consider adjourning and need not refer to having considered adjourning. In other words the claimant’s choice in this matter can be relied on unless there is something to indicate that it may not be proper to determine the matter on the papers. As Mr Commissioner Williams stated at paragraph 20 of the above decision:

“... A tribunal conducting a paper hearing must have these powers in mind and must consider their use in any appropriate case. ...”

The tribunal’s duty is to conduct a fair hearing, this can be done either on the papers or by way of an oral hearing. If there is no indication that determination on the papers would not lead to a fair hearing the tribunal need not adjourn nor even consider adjourning. To use Commissioner Williams’ words the case is not an “appropriate case”.

30. In light of this jurisprudence, I turn to the statement of reasons for the appeal tribunal’s decision and, in particular, its determination to proceed with the hearing in the absence of the appellant. In the statement of reasons for its decision, the appeal tribunal has recorded the following:

‘On 26 November 2021, the Appellant asserted in writing that he wished this new Disability Appeal Tribunal to determine his case by way of a paper determination.

...

By way of letter from the Appellant, dated 25 February 2022, the Appellant stated;

"I have received a decision from you that on 4/2/22 my appeal was disallowed. It states on the decision that it was a 'paper hearing' and that I was not present. I request that you set aside this decision to allow me to either be present at {I attended a previous hearing) or represented at or both? I received no notification that my appeal was being heard. If I made a mistake by ticking an incorrect box on a form I returned to you, I can only apologise. If you cannot set your decision aside, please forward to me copies of the Tribunal's proceedings and reasons for the Tribunal's decision".

This application for a set aside was considered by the President of the Appeal Tribunals in Northern Ireland on 11 July 2022. The President directed that there were no grounds to set aside the decision of 4 February 2022 pursuant to Regulation 57 of the Social Security & Child Support (Decisions & Appeals) Regulations (NI) 1999, and that the Appellant had elected to have his appeal determined by way of a paper determination and the hearing on 4 February 2022 proceeded accordingly.'

31. It is axiomatic that I accept that the appellant completed and returned a 'Reply Form' to TAS concerning the mode of hearing which he wished to choose. The completed form is in the file of papers which is before me. It is signed by the appellant, but the precise date is, to an extent indecipherable. It appears to be 21 November 2021. It is date-stamped as having been received in TAS on 30 November 2021. Most significantly, the appellant ticked a box to indicate that:

'I wish to have my appeal dealt with by way of paper determination and I understand that by choosing this option I will not be notified in advance of the date that my hearing will take place, but I will be notified in writing of the outcome of the appeal.'

32. The other options set out in the 'Reply Form' and are set out in clear and unambiguous terms and provide three different options for oral hearings.
33. In light of the appellant's choice, I can understand why the appeal tribunal, at the outset of the hearing, determined to proceed in the absence of the appellant. The eventual decision of the appeal tribunal was a majority

decision which indicates that there was a detailed discussion of the issues arising in the appeal and a lack of unanimity about its outcome. The statement of reasons for the appeal tribunal's decision reveals that central to its assessment of the evidence which was before it was a frustration that the tribunal could not see and hear from the appellant. The appeal tribunal uses the phrases 'stymied' or 'hindered' in its inquisitorial role, by the appellant's choice of a 'paper' hearing, in probing certain critical issues. It is highly likely that this dissatisfaction would have emerged during the appeal tribunal discussions and, in my view, could and should have led to a consideration as to whether it would be appropriate to adjourn to permit the appellant to attend or participate in an oral hearing to give evidence. The appeal tribunal was not bound by its initial decision to proceed in the appellant's absence. In line with the principles set out in the jurisprudence above, the inquisitorial role and the interests of justice mandated that it pondered whether an adjournment was appropriate. An adjournment may or may not have required but the appeal tribunal gives no indication in the statement of reasons that it considered it. In my view, the fact of a majority decision and the hesitation with respect to overall conclusions in key areas, did mandate such consideration. I am satisfied, therefore that the appeal tribunal has committed or permitted a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings and, as such, its decision is in error of law.

34. I turn to another aspect of the appeal tribunal's statement of reasons relating to its self-imposed determination not to consider the evidence recorded in the record of proceedings and analysed in the statement of reasons by the earlier appeal tribunal which had sat on 10 October 2019. In the statement of reasons for the appeal tribunal's decision in the instant case, the following is noted:

'The new Tribunal sat on 4 February 2022 in Dungannon. It considered all of the evidence and submissions before it. The Appellant did not attend and was not represented. The Department was not represented. In these reasons this Tribunal emphasises that it considered all of the evidence and submissions **before it save for the evidence as recorded by the first Tribunal of October 2019 and the reasons of that Tribunal because - as the decision of the Commissioner abundantly held - the determinations of that Tribunal were found to be in error of law and thus set aside.** Therefore, that evidence and those reasons were annulled, and of no standing before the Tribunal sitting on 4 February 2022.'

35. The emphasis here is my own.
36. In his written observations on the application for leave to appeal, Mr Killeen has made reference to the decision of Commissioner Stockman in *RH v Department for Communities (PIP)* ([2022] NIComm08 (C34/21/22 PIP)

(*RH*) and, more particularly, part of paragraph 31 and all of paragraph 32 of that decision, which are as follows:

'31. ...remittal to a newly constituted tribunal gives rise to another question about the previously recorded evidence and whether it should be placed before the new tribunal in the absence of, or additional to, any oral evidence.

32. It is axiomatic that there are no formal rules to limit the admissibility of evidence in tribunals, except perhaps on human rights grounds (see *PMcC v Department for Communities* [2020] NI Com 65). The record of evidence of the tribunal in the March 2020 hearing, it seems to me, amounts to hearsay evidence. It is the LQM's recorded account of what the appellant told the first tribunal. Had the present tribunal been constituted differently and been able to proceed, that record would have been the only record of oral evidence given directly by the appellant. In such circumstances, and with appropriately diminished weight on the basis that it was hearsay, I consider that the record of the previous hearing ought to have been admitted as evidence.'

37. I accept that, in the instant case, the appeal tribunal concluded that much of the decision of Commissioner Stockman which had set aside the decision of the earlier appeal tribunal of 10 October 2019, was centred on conflicting evidence before the earlier tribunal concerning the appellant's driving. To the extent, however, that the appeal tribunal determined that, as a matter of law, it could not consider any of the evidence recorded in the record of proceedings for the earlier appeal tribunal, that determination conflicts with what was said by Commissioner Stockman in *RH*, and, accordingly, amounts to a clear error of law.
38. I am of the view that the error is material. The record of proceedings for the earlier appeal tribunal hearing recorded evidence from the appellant which was clearly related to whether he satisfied the conditions of entitlement to PIP. I accept, as did Commissioner Stockman in *RH*, that the evidence was hearsay and would have to accorded, as he put it, 'appropriately diminished weight, but that does not mean that it was not admissible. As was noted above, the appeal tribunal in the instant case, has noted at several points in the statement of reasons for its decision, that it was 'stymied' or 'hindered' in its inquisitorial role by the decision of the appellant to have his appeal determined by way of a 'paper hearing', meaning that the appeal tribunal did not have the opportunity to hear and see him. Further, the appeal tribunal noted that there were no other witnesses, and the appellant was not represented. The earlier appeal tribunal did have the opportunity to hear from and see the appellant. He was accompanied by his wife who gave evidence and was represented by Mr Gibson. In my view, this reinforces the requirement to consider the evidence as recorded in the record of proceedings for the earlier hearing.

In addition, I cannot ignore that the decision of the appeal tribunal was a majority decision and it is arguable that consideration of the evidence contained in the record of proceedings for the earlier appeal tribunal hearing might have been beneficial.

39. Finally, I have noted Mr Killeen's submission that while the statement of reasons for the appeal tribunal's decisions records the decision of the minority in relation to most of the key aspects of the appeal on which there was not unanimity, it did not do so in respect of one such issue. I agree with Mr Killeen and conclude that the failure to records the minority reasons on that specific issue was an error. I do not, however, agree that the error was material.

### **Disposal**

40. The decision of the appeal tribunal dated 4 February 2022 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.
41. 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 24 October 2018 in which a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 13 August 2018;
  - (ii) 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 PIP into account in line with the principles set out in *C20/04-05(DLA)*;
  - (iii) 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
  - (iv) 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): KENNETH MULLAN

CHIEF COMMISSIONER



17 September 2024