DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Liverpool First-tier Tribunal dated December 8, 2016 under file reference SC068/14/01199 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated January 30, 2014 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge or members who were previously involved in considering this appeal on August 21, 2014, September 29 & 30, 2015, April 15, 2016 or December 8, 2016 (or indeed on any other dates).

(3) If the Appellant has any further written evidence to put before the tribunal, this should be sent to the regional tribunal office in Liverpool within one month of the issue of this decision.

(4) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

(5) Case management for the re-hearing should be reserved to the Regional Tribunal Judge.

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

REASONS FOR DECISION

Introduction

1. Oh dear. Oh dear. Oh dear.

The background

2. This case is a "second time around appeal" before the Upper Tribunal. My decision on the "first time around appeal" is to be found with the case name and NCN (neutral case citation) *AF v Secretary of State for Work and Pensions (DLA)* [2015] UKUT 266 (AAC). That first time around appeal to the Upper Tribunal was supported by the Secretary of State's representative. I gave extensive reasons for my decision in 2015 as I was so concerned at certain aspects of the procedure adopted before the First-tier Tribunal in Liverpool.

3. Indeed, I was so concerned that in my ruling granting permission to appeal on the first time around appeal, I described the case as a "car crash". Moreover, taken together with its companion appeal, *JF v Secretary of State for Work and Pensions (DLA)* [2015] UKUT 266 (AAC), I described it as a "mini motorway pile-up" (see [2015] UKUT 266 (AAC) at paragraph 9, citing paragraph 4 of the permission ruling). It only gets worse second time around.

4. That description of the First-tier Tribunal's conduct of the case might be thought by some to be a touch over-melodramatic. But it has undoubtedly got worse. Unusually, I am almost lost for words.

5. To set the scene it may be best to start with the summary in the first time around decision in 2015 (at paragraph 2):

> "This appeal is one of two related appeals. The present case, CDLA/5548/2014, concerns the adult daughter ('the daughter') of an appellant ('the mother') in another Upper Tribunal appeal under reference CDLA/5547/2014. Both mother and daughter, who lived at the same address, had been in receipt of disability living allowance (DLA) for some years. In 2014 the Secretary of State decided that the daughter had not been entitled to DLA from the outset of her claim in 2001, creating a recoverable overpayment of over £53,000. A disentitlement and overpayment decision was also made in respect of the mother, although in her case not going back to the start of her claim."

6. This second time around appeal relates solely to the adult daughter's case.

7. The Secretary of State's representative in these proceedings, Mr Kevin O'Kane, very fairly supports this second appeal as his colleague did on the first time around Upper Tribunal appeal. As before, I give full reasons in the hope that it will be "third time lucky" in terms of holding an effective and proper First-tier Tribunal which provides the Appellant with a fair and just hearing.

The grant of permission to appeal on the second time around case

8. The First-tier Tribunal duly re-heard the appeal remitted by my 2015 decision. The First-tier Tribunal again upheld the Department's entitlement and overpayment recoverability decisions dated January 30, 2014.

9. I gave the Appellant permission to appeal on the second time around case in the following terms:

'Introduction

1. It is very difficult to know where to start with this application for permission to appeal.

2. If that sounds familiar, it is because I started my previous Upper Tribunal decision, involving the very same Appellant, in *AF v SSWP (DLA)* [2015] UKUT 266 (AAC) (CDLA/5548/2014, pp.1023-1131 of this file) with a similar form of words. So this case is a "second time around" at the Upper Tribunal.

3. In *AF v SSWP (DLA)* I set aside the First-tier Tribunal (FTT)'s decision dated August 21, 2014, which had upheld the Department's decision that the Appellant was not properly entitled to disability living allowance (DLA) from the date of her original award in 2001 and had accordingly been overpaid a substantial sum of money by way of DLA. I sent the appeal back for re-hearing before a fresh FTT.

4. A new FTT re-heard the appeal on April 15, 2016 (record of proceedings (RoP) pp.1246-1251). Its decision was to allow the appeal in part (p.1252; statement of reasons (SoR) at pp.1254-1265). Both parties applied for permission to appeal and the decision was set aside under s.13(3) of the Social Security Act 1998 (p.1266). So it went to yet a further hearing.

5. A differently constituted FTT heard the appeal on December 8 and 9, 2016 (RoP [record of proceedings] pp.1270-1285). This FTT dismissed the appeals and confirmed the Secretary of State's decisions (p.1287). The SoR is at pp.1289-1296. The FTT has refused permission to appeal.

6. I am giving permission to appeal (again) for the following reasons.

The grounds of appeal

7. I note that the representative who acted for the Appellant at the last FTT hearing and who apparently drafted the grounds of appeal is no longer able to act for the Appellant. I have to say the grounds of appeal are somewhat diffuse and to a great extent seem to seek to re-argue the facts. There are, however, sufficient matters of concern to give permission to appeal. Without prejudice to what may yet appear on a fuller investigation of the file, the following potential grounds seem to arise. Some may be stronger than others.

<u>Should the FTT have granted an adjournment?</u>

8. This appeal has a very long and troubled history. I can quite understand why the FTT wished to make the hearing date effective. However, the hearing has to be fair. In the present case the Appellant's then representative was not available on the day in question.

9. I also recognise that at the start of the hearing (i.e. at 2pm) on December 8, 2016 the Judge noted in his RoP that "rep cannot attend. No request for further adjournment and ready to proceed" (p.1270).

10. However, I have also read the pre-hearing correspondence, or at least some of it – in particular the Appellant's emails of November 7 & 30 and December 6, 2016 (pp.1269AA and 1269A). I recognise that on December 7, 2016 the Regional Tribunal Judge refused a postponement request.

11. Nonetheless, and despite the Appellant's apparent consent at the hearing, there is an argument the FTT may have erred in law in not considering adjourning at all and/or in not actually adjourning. The Appellant's point in para.

1 of her e-mail of November 7, 2016 would seem to have some force. I accept listing is pre-eminently a FTT function. But I have very real concerns as to whether a fair hearing can take place in the course of one afternoon involving a case of this magnitude with such a large amount of documentary evidence.

12. I note in that regard (i) the set aside hearing on April 15, 2016 lasted from 10.10 a.m. to 5.20 pm (pp.1246-1251) and (ii) the subsequent DTJ's direction (p.1234) that the case should be re-listed for a whole day before a new panel.

<u>Did the FTT make sufficient findings of fact and/or give sufficient reasons for its decision?</u>

13. On any reckoning this was a complex case. Obviously the FTT does not have to deal with every single piece of evidence. It does, however, have to make the essential findings of fact and give adequate reasons for its decision. The grounds advanced by the Appellant's then representative are largely directed to this complaint. It seems to me that ground is arguable. For example, although it may be a rather minor point in the overall scheme of things, the FTT (apparently incorrectly) found that the Appellant had been paid the highest rate of the care component of DLA between 2001 and 2003 (p.1289, para.1). The Department's own correction was that this component was in fact paid at the middle rate (p.1226).

14. By way of a further example, in the original grant of permission to appeal "first time around" I had this to say:

> '17. The FTT, however, concluded that the Appellant had not been virtually unable to walk in 2001. It reached that conclusion on the basis of its review of the medical evidence, of witness statements from workmates from 2000 onwards and from the 2004 and 2013 video and DVD evidence. It seems to me that was a conclusion the FTT was in principle arguably entitled to reach on the evidence before it. However, the FTT seemingly failed to consider at least two pieces of evidence which apparently supported the Appellant's case that she was entitled to higher rate mobility at the outset. The first was a GP factual report dated 29.01.2002 (and so presumably before the original decision-maker) in which the GP stated that the Appellant could walk only 0-50 m before severe discomfort [218-211]. The second was an EMP report dated 14.01.2014, and so available at the time of the 2004 renewal claim. The EMP assessed the Appellant as having "substantial impairment" in both lower limbs, noting "reduced power and sensory loss to legs; impaired co-ordination on heel to shin test" [111]. The EMP further assessed the distance the Appellant could walk before severe discomfort as being "<u>on average</u>, about 20 metres" [113]. It is unclear what the FTT made of this evidence.'

15. In the present SoR the FTT dealt with the GP and EMP evidence from 2004 at para. 19 (p.1295). However, is that explanation really sufficient?

<u>The treatment of the video surveillance evidence</u>

16. I have three specific concerns in this regard. However, I repeat what I said in my original first time around grant of permission to appeal (at para. 15): "Unlike the FTT, I have not viewed the video or DVD evidence. However, based on the FTT's very detailed account of that evidence, I can quite understand why, putting it neutrally, there might well be a very large question mark over, at the very least, the Appellant's continued entitlement to DLA." But that is no excuse for not following due process.

17. First, the grounds of appeal assert that the Appellant was not present when the video tape evidence was viewed by the tribunal. Directions for an earlier

hearing were clear that the DVD should be played so that the panel and the appellant (and representative) all viewed the recording at the same time, as I understand is normal practice (see p.1045 at para. 1a). That seems not to have happened here. The clerk explained that the hearing would start at 2pm on the 8th "with the possibility of the hearing running on" to the 9th (p.1269B). Somewhere on the file I recall seeing a note to the effect that the FTT panel convened at 10 am on morning of the 8th to read the file. All the RoP notes (at p.1255) is as follows:

> "Reconvene 10 am 9/12/16.
> Video commence 10.05 am. Finish 11.20 am.
> View of Greek holiday.
> Goodison Park.
> Aintree".

All that rather suggests the FTT viewed the DVD alone. Certainly there is no suggestion that points arising out of the DVD were put to the Appellant. Given the extensive documentation about the video evidence, that seems curious and arguably a breach of natural justice.

18. A second potentially related point concerns the decision to discontinue the criminal prosecution (p.1268). The Appellant says that she tried to obtain the "material [which] has come to light" but was refused. There are, of course, important differences between civil and criminal proceedings. However, should the FTT not have been more alert to the argument that if "material has come to light" which justified discontinuance there was at least a possibility such "material" might also have a bearing on the civil proceedings? The Secretary of State, of course, is under an ongoing duty to produce "all documents relevant to the case" - see rule 24(4)(b)).

19. The third point is one nowhere raised by the Appellant for the simple reason she seems to be unaware of it. The Fraud Officer who interviewed the Appellant under caution on September 19, 2013 was a Ms TK (p.440). She also attended the first time around FTT hearing on August 21, 2014 (p.559), presumably as a witness as a DWP PO was present. She also attended the adjourned hearings on September 29 and 30, 2015 (pp.1183 and 1189). Her evidence was clearly regarded as potentially relevant as she was directed by the FTT to attend the next hearing on November 17 and 18, 2015 (p.1191, para. 3). That hearing seems to have been postponed but she attended again the (later set aside) hearing on April 15, 2016 (p.1246). She certainly gave evidence at that hearing, as seen from the RoP. She did not give evidence at the final hearing on December 8, 2016 – instead she was replaced by another fraud officer, a Mr MB (p.1270).

20. The reason for that was that on November 18, 2016 the DWP wrote to the Regional Tribunal Judge informing her that Ms TK had been dismissed from her role as a fraud officer. The DWP suggested an alternative witness (Mr MB). The Regional Tribunal Judge accepted that proposal by letter dated November 23, 2016. That exchange of letters did not appear in the tribunal appeal hearing bundle and so was not issued to the parties. The formal position is that the DWP should have made an application to change its witness, which the FTT could then rule on and make a proper ruling. At the very least the Appellant should have been advised of the change. It is entirely possible that the reason for Ms TK's dismissal had nothing to do with the Appellant's case. However, given that the DVD evidence appeared to be in dispute, it seems to me at least arguable as

> a matter of simple fairness the Appellant was entitled to know both (i) that the witness was going to be changed and (ii) why the witness had been changed. She may well have wished to make an application or representations in that regard. I cannot see that any explanation was forthcoming at the final hearing. I direct that the exchange of letters be added to the file now.
>
> *Conclusion*
> 21. I repeat what I said in the earlier proceedings. It may well be that the Appellant was not properly entitled to disability living allowance (DLA) from the date of her original award in 2001. However, that is ultimately a question of fact, and so is not a question for me in the Upper Tribunal to judge. I emphasise that the fact I am giving permission to appeal against the tribunal's decision should not be taken as expressing any view at all on the underlying issue of whether or not the Appellant was properly entitled to DLA and, if she was not, whether she is now liable for a recoverable overpayment of that benefit. I simply do not know.
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> 22. What I do know is that the present grounds of appeal are arguable.'

10. As re-formulated by my grant of permission, there were accordingly three principal grounds of appeal relating to (1) the adjournment question; (2) the First-tier Tribunal's findings of fact and reasons; and (3) the Tribunal's treatment of the video surveillance evidence (or rather the evidence more generally, as we shall see).

11. Mr O'Kane for the Secretary of the State supports the appeal on all three points.

The adjournment issue

12. I dealt with this ground of appeal at paragraphs 8-12 of the grant of permission. It will be recalled that the DTJ instructed the case be listed for a full day. Despite this, the case was apparently listed for an afternoon session with the "possibility" of running into a second day. For completeness I should perhaps add that point (1) of the Appellant's email to the Tribunal office dated 7 November 2016 (referred to in paragraph 11 of the grant of permission – see above at paragraph 9) read as follows:

> "This is the fourth panel to hear this appeal and experience tells me it will not be possible for it to be heard in half a day. The panel struggled to hear it in a full day last time and we were last to leave the building. Watching the surveillance alone takes around 90 minutes and there are then over 1000 pages in the bundle".

13. In the same e-mail the Appellant argued that a single full day hearing was highly preferable as her representative (a lone parent working for a charity) did not live in Liverpool and would need to arrange both overnight accommodation for herself and overnight child care for her children back at home. The Appellant received no reply to her e-mail of 7 November 2016. She accordingly sent it again on 30 November 2016, pointing out "I am growing concerned as there is only one week to the hearing". On 6 December 2016 – 48 hours before the hearing – the Tribunal office replied with details of the listing arrangements and noting that the Appellant's representative would not be attending. On 7 December 2016 the Appellant sent the Tribunal office a long e-mail stating she was "absolutely horrified to learn that I am expected to attend my hearing on 8/12/16 without representation …. I had no idea the courts would expect me to attend the tribunal without my representative if she wasn't available, I clearly wrongly assumed a new date would be set which was convenient to all parties. I do not want the tribunal to continue whilst I have no representative present."

14. It was presumably this e-mail that prompted the Regional Tribunal Judge's consideration and then refusal of the postponement request on December 7, 2016,

i.e. the day before the hearing. At the hearing itself the Tribunal's record of proceedings noted at the outset: "rep cannot attend. No request for further adjournment and ready to proceed". It is not clear whether the Appellant's e-mail of 7 December 2016 was drawn to the attention of the Tribunal on the day of the hearing.

15. Relying on the principles set out by Upper Tribunal Judge Jacobs in *MA v Secretary of State for Work and Pensions* [2009] UKUT 211 (AAC), Mr O'Kane argues as follows:

> "In the instant case the First-tier Tribunal failed to consider whether it would be beneficial to adjourn in the light of the representative's inability to attend the hearing, nor did they attempt to establish why the representative could not attend, and finally they failed to consider what impact an adjournment might have.
>
> I submit that given the evidence that the claimant would not have the benefit of representation because the hearing was listed to commence at 2 pm on the afternoon of the 8th December 2016 and would reconvene on the 9th December if necessary, meant that the claimant was denied effective representation, and I submit the failure to adjourn and relist the hearing for a full day in order to allow the claimant the opportunity to be represented at the hearing constituted a breach of natural justice."

16. I agree.

17. As Collins J pithily put it in *R v Social Security Commissioner ex parte Bibi* (C0/2577/99, unreported, May 23, 2000), "I appreciate that there is no absolute right to representation, but there is an absolute right to be dealt with fairly" (at paragraph 18). This is not intended as a criticism of the Regional Tribunal Judge's refusal of the postponement request on December 7, 2016 – many a judge in such circumstances would take the view that such a matter was (by implication at least) best left to be determined by the tribunal on the day (24 hours later). In this case, however, there is not even the hint of a suggestion that the Tribunal considered whether it might be better to adjourn.

18. The fact that the (now unrepresented) Appellant herself did not make an application for an adjournment and may apparently have agreed to going ahead ("No request for further adjournment and ready to proceed") is no excuse. It is well established that there may be circumstances in which a tribunal may err in law by proceeding notwithstanding that no request has been made to adjourn (see *Priddle v Fisher & Sons* [1968] 1 WLR 1478; *CH v Secretary of State for Work and Pensions (DLA)* [2012] UKUT 427 (AAC)). Moreover, context is all important in assessing how the overriding objective plays out. This was not an appeal about whether a claim for benefit could be backdated for a couple of weeks – the Appellant was facing a potential liability in excess of £50,000 and a bundle running to well over 1,000 pages. This Tribunal's decision to proceed was not so much robust as rash. Bearing in mind the requirements of rule 2, its failure to consider whether to adjourn amounted to an error of law.

The First-tier Tribunal's findings of fact and reasons

19. I dealt with this ground of appeal at paragraphs 13-15 of the grant of permission. In a nutshell, Mr O'Kane agrees that the Tribunal failed to make adequate findings of fact as regards both mobility and care. As he puts it, the Appellant "is left wondering how they reached the determination that her walking ability was not limited for most of the time". He makes the same point in relation to care needs. I need say no more

than this ground of appeal succeeds. The next Tribunal should bear in mind the points made in the 2015 decision about the issues on which clear findings of fact and adequate reasons are needed.

The First-tier Tribunal's treatment of the video surveillance evidence

20. It will be recalled that this ground actually raised three discrete but possibly inter-related evidential issues: (i) viewing the video surveillance evidence; (ii) the discontinued criminal prosecution; (iii) the application by the Department to change its witness.

Viewing the video surveillance evidence

21. The video evidence was obviously important to the case. It seems that every tribunal panel which has considered this case has concluded that it supports the Department's case that there was an overpayment of DLA and that overpayment was recoverable. As I said when giving permission to appeal in the first time around case:

> "15. The FTT viewed the video and DVD evidence at the first hearing. This comprised a holiday video in Greece dating from 2004 and DWP surveillance conducted in 2013 and captured on DVD. The latter included following the Appellant around town, to football matches (where she was a season ticket holder) and (on one occasion) to the races at Aintree. Unlike the FTT, I have not viewed the video or DVD evidence. However, based on the FTT's very detailed account of that evidence, I can quite understand why, putting it neutrally, there might well be a very large question mark over, at the very least, the Appellant's continued entitlement to DLA."

22. I dealt with this issue at paragraph 17 of the grant of permission to appeal in this second time around case. The Appellant is adamant that she was not in the room when the Tribunal viewed the evidence in question and not given the option to be in the room. The video/ DVD evidence was plainly disputed as the Appellant had made written submissions on that evidence (not referred to by the Tribunal in its statement of reasons). There is no suggestion in either the record of proceedings or the statement of reasons that she was present when the panel viewed the evidence and was asked questions about it – indeed, the cursory note of the proceedings on the second day strongly suggests that she was not.

23. The Appellant's contention appears to be confirmed by comparing the record of proceedings with the GAPS2 clerical record on the appeal. The very last entry on the record of proceedings for the hearing on December 8, 2016 states "PO [presenting officer] hands in Greek holiday DVD (82 minutes) (His copy + he wants it returned)." The clerk's GAPS 2 entry for 4.10 pm on the first day of the hearing (and at presumably the end of that afternoon session) reads as follows:

> "PO left a DVD for the panel to view. He has asked it either be securely returned and marked for his attention or destroyed. If it is destroyed he will need to be informed of this."

24. I am left in little doubt that (i) the Tribunal viewed the evidence by itself on the second day of the hearing; (ii) the Tribunal did not put any questions about what it had seen in the video or DVD evidence to the Appellant. The fact that the Appellant had previously put in written submissions about some of that evidence was no substitute for such an opportunity.

25. Mr O'Kane, for the Secretary of State, simply submits that "the failure of the First-tier Tribunal to allow the claimant the opportunity to comment on issues that arose from their viewing of the DVD constitutes a breach of natural justice."

26. I agree. I am speechless.

The discontinued criminal prosecution

27. These protracted tribunal proceedings have run in parallel for several years with criminal proceedings brought by the Department against the Appellant (see paragraph 8 of my 2015 decision). Given the size of the alleged recoverable overpayment of DLA, that is unsurprising.

28. On September 5, 2016 the Appellant e-mailed the Tribunal office with a copy of a letter her solicitors in the criminal proceedings had received from a Senior Crown Prosecutor at the Crown Prosecution Service (CPS) dated September 2, 2016. The letter was headed "**NOTICE OF DISCONTINUANCE**" (emphasis as in the original). It stated that the CPS had written to the Crown Court manager discontinuing (i.e. dropping) charges relating to alleged dishonest representations for obtaining benefit said to have been made in 2001 and 2003. The letter stated that accordingly she did not need to attend for the Crown Court hearing scheduled for September 6, 2016. The explanation given for the discontinuance was as follows:

> "As part of the Prosecution's ongoing review process, material has come to light which has prompted a further review of the case. I have carried out that review and found that there is no longer sufficient evidence to provide a realistic prospect of conviction."

29. No further details were forthcoming in the letter. That letter was duly added to the Tribunal bundle so was certainly before the Tribunal at the hearing three months later.

30. On the basis of the record of proceedings, it appears there was a brief discussion at the Tribunal about the abandoned criminal prosecution at the end of the afternoon session on the first day. The Appellant stated that "Crown Court case has been discontinued – after discovery new material". The presenting officer, perhaps distancing himself from the CPS decision, confirmed that "Crown Prosecution [Service] have taken a decision to offer no evidence".

31. The Appellant herself added that she had attended the Crown Court on September 6, 2016, although not required to do so, and the "judge then found me not guilty as prosecution offered no evidence, based they said on fact new evidence had come to light – but not prepared to release that new evidence". That was the last recorded contribution to the afternoon's proceedings at the Tribunal before the presenting officer's production of the Greek holiday DVD. So it appears the Tribunal asked no questions about the mysterious "new evidence".

32. In its statement of reasons the Tribunal noted that there had been a criminal investigation (paragraph 3) and that it had considered reports taken from that process (paragraph 6). Beyond that, there was no reference whatsoever to the fate of the criminal proceedings nor in particular to the "new evidence".

33. Mr O'Kane's submission on this issue is short and to the point:

> "Having due regard to the provisions of rule 24(4)(b) of the First-tier Tribunal Rules 2008 it is submitted the Secretary of State is under a duty to produce copies of all documentation relevant to the case that is in his possession.
>
> Clearly a decision to discontinue criminal proceedings could be relevant to the outcome of the hearing, and in failing to at least consider there was a possibility the material might have a bearing on the outcome of the civil proceedings, the First-tier Tribunal could be seen to have erred in law."

34. Again, I agree.

35. Rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) provides that "The decision maker must provide with the response…copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise". As Upper Tribunal Judge Wright has explained "The key word here is 'relevant'. The use of the word 'must' also makes clear that the Secretary of State's decision maker is under a legal obligation to provide the Fist-tier Tribunal with copies of all documents relevant to the case that he has in his possession" (*ST v Secretary of State for Work and Pensions (ESA)* [2012] UKUT 469 (AAC) at paragraph 25).

36. We have no idea what the "new material" or "new evidence" was that led to charges being dropped. It is possible it has nothing to do with the issue of civil liability under social security law. But it may be documentation which assists the Appellant's case. It may not be a document at all, but rather the fact we now know that one of the officers on the fraud investigation team had subsequently been dismissed (and see further below). The Appellant states (and again, I have no way of knowing whether this is accurate) that "I am aware the same Fraud Officer illegally obtained my mother's medical records and withheld evidence in my mother's favour when investigating her case (which is now closed)."

37. It is true, of course, that the civil and criminal proceedings are separate and operate under different rules (again, see further below). However, the Tribunal displayed a worrying lack of curiosity in its approach to this issue. Warning bells should have been ringing when it heard the criminal case had been dropped because of "new evidence". At the very least the Tribunal should have asked what that new evidence was and whether it was relevant to the Secretary of State's duty to disclose under rule 24(4)(b). Its failure to act in a suitably inquisitorial manner was a further error of law.

The application by the Department to change its witness

38. I have summarised the details of this application in paragraphs 19 and 20 of my grant of permission to appeal. The exchange of correspondence between the DWP's regional surveillance manager and the Regional Tribunal Judge was entirely proper and anodyne on its own terms. Two weeks before the hearing, the DWP regional surveillance manager wrote as follows:

> "In respect of the above case, I wish to advise you that the Lead Investigator, TK has been dismissed from her role as a Fraud Investigator (Surveillance Officer).
>
> In light of these circumstances the SSWP suggest that an alternative witness MB provide evidence instead and will be able to assist the court sufficiently to enable the case to proceed.

If I can assist you any further with this matter please do not hesitate to contact me."

39. The Judge's reply was as follows:

> "Thank you for your letter dated 18th November 2016 regarding the hearing of the Appeal lodged by AF. I am grateful to you for updating me on the position and I confirm that the Tribunal will hear from MB in relation to that case."

40. In another recent decision I have commented on the need for some interlocutory applications to the First-tier Tribunal to be dealt with rather more formally and for both (or all) parties to be advised of the application in question and its outcome (see *SM v Secretary of State for Work and Pensions (SPC)* [2017] UKUT 336 (AAC) at paragraphs 57 and 58). That was a case in which the Department had been barred from further participation as respondent in the proceedings (for its repeated failure to comply with tribunal directions) but had then, unbeknownst to the appellant, been reinstated on a subsequent application:

> "57. The fourth [point about case management] is that judicial rulings and directions need to be set out in an appropriate format for the matter in question. The appropriate format will necessarily depend on the context. A duty judge granting or refusing a postponement may well indicate as much in a hastily handwritten note on a referral sheet provided by a tribunal clerk. However, weightier matters require a more formal approach. In *London Borough of Camden v FG (SEN)* [2010] UKUT 249 (AAC) HH Judge Pearl held that a witness summons should be signed by a judge, rather than pp'd on her or his behalf (at paragraph 57). Similarly, at paragraph 30, Judge Pearl held that a ruling striking out a party's case (or barring a respondent from further participation) should be expressed:
>
> > "in the form of an Order, be signed by the Judge who has made the decision rather than being pp'd on his or her behalf in the form of a letter, and specific reference be made to the fact that if the party concerned wishes to take matters further then an application must be made under Part 5 of the Rules (Correcting, setting aside, reviewing and appealing Tribunal decisions), and if any such decision under Part 5 goes against him or her, that an application must be made to the Upper Tribunal for permission to appeal on the basis of an arguable error of law (*Synergy Child Services Ltd v Ofsted* [2009] UKUT 125 (AAC)."
>
> In the light of that guidance, I consider that the directions in relation to the DWP's reinstatement application should have been set out in judicial directions and signed by the judge, and not simply contained in a letter signed by a tribunal clerk (see paragraph 18 above).
>
> 58. Finally, the Tribunal must deal with the parties in an even-handed manner. According to GAPS2, the letter of October 16, 2015 containing directions for the DWP's reinstatement application was only sent to the Respondent. Not only should it have been issued in a more appropriate format, it should have been sent to the Appellant. He knew that the DWP had been barred from participating and was entitled to know that the DWP had made a reinstatement application. He may well have had something to say about that. It is a damning indictment of the processes adopted in this case that this Upper Tribunal decision may well be the first the Appellant has heard about both the DWP's letter of September 25, 2015 and the Tribunal's directions of October 16, 2015."

41. Mr O'Kane argues that "at the very least the claimant should have been notified of the change and the reason for that change". I agree, recognising that context, as ever, is crucial. This was a bitterly contested and complex case in which a previous Tribunal had specifically directed that officer TK attend the Tribunal as a witness. The fact that a fraud officer central to the case had been dismissed was potentially of relevance to the issues the Tribunal had to determine. It is, of course, entirely possible her dismissal had nothing to do with the present proceedings. Perhaps she had been dismissed for writing defamatory comments about the Secretary of State in her personal blog, in breach of civil service employment terms and conditions. We simply do not know. But we do know criminal proceedings against the Appellant had recently been discontinued in circumstances which at the very least raised a question mark about the propriety of the counter-fraud investigation. The fact that the change of witness was made by way of correspondence is not really the issue. The issue is that the Appellant was left completely in the dark. It is not clear to me why the information was not disclosed or what standing or specific instructions are given to HMCTS staff about such matters. It is possible there were data protection concerns (e.g. regarding the dismissed employee's privacy rights). However, section 35(2) of the Data Protection Act 1998 provides that "personal data are exempt from the non-disclosure provisions where the disclosure is necessary – (a) for the purpose of, or in connection with, any legal proceedings". In any event, as a matter of elementary fairness, at the very least the exchange of correspondence should have been copied to the Appellant or her representative.

Conclusion on the grounds of appeal

42. All three grounds of appeal are made out. The Tribunal's decision involves multiple errors of law and must be set aside. I direct (another) re-hearing. There are a number of other matters I should touch on.

The relevance of the discontinued criminal prosecution

43. In her reply to Mr O'Kane's submission on her appeal, the Appellant writes as follows:

> "I do not understand how Crown Court can find me not guilty due to the Secretary of State's actions but yet three months later civil court finds me guilty of the same offence? I had already been found not guilty, does this have no bearing at all?"

44. The short answer is no, it does not (subject to what is said above about the mysterious "new evidence").

45. The reason for this is that the criminal and civil proceedings operate according to different rules. In particular, the burden and standard of proof are different. The rules governing liability are different. Just to take one example, the criminal charges brought by the CPS on behalf of the Department need proof of dishonesty beyond reasonable doubt, whereas the Department's civil claim for the recovery of the alleged DLA overpayment can be founded on the balance of probabilities on an entirely innocent misrepresentation.

46. So the simple fact that the criminal charges have been dropped does not automatically mean that the Department's civil claim faces the same fate.

The venue and listing arrangements for the re-hearing

47. The Appellant asks for any further First-tier Tribunal hearing to be moved to a different venue than Liverpool. She does not give any reason. I think this is a matter

best left to the judgement of the judge responsible for further case management. Given the unfortunate history of this case, I consider that such further directions should be reserved to the Regional Tribunal Judge. It is not for me to micro-manage that process. However, given the complexity of this case and the size of the bundle, I would suggest that in fairness to all concerned, and especially with a view to ensuring the appeal is dealt with fairly and justly, the new tribunal panel should be allocated one day's preparation (i.e. reading) time and at least one day (i.e. two sessions) for the hearing itself.

Postscript: Section 13(3) of the Social Security Act 1998

48. It may be recalled that the Tribunal that sat on December 8, 2016 was not the first tribunal panel to hear the case following the remittal made by the 2015 Upper Tribunal decision. As I noted at paragraph 4 of the grant of permission second time around:

> "4. A new FTT re-heard the appeal on April 15, 2016 (record of proceedings (RoP) pp.1246-1251). Its decision was to allow the appeal in part (p.1252; statement of reasons (SoR) at pp.1254-1265). Both parties applied for permission to appeal and the decision was set aside under s.13(3) of the Social Security Act 1998 (p.1266). So it went to yet a further hearing."

49. The Tribunal that had sat on April 15, 2016 allowed the Appellant's appeal in part. That Tribunal confirmed the Secretary of State's (dis)entitlement decisions, stating that there were grounds to revise the original awards in 2002 and 2004, but varied the overpayment recoverability decision. In summary, the Tribunal ruled that payments of the DLA care and mobility components were recoverable for the period between November 2001 and November 2003, along with the mobility component from November 2003 through to May 2013. However, the Tribunal also held that the overpayment of the care component from November 2003 was not recoverable, having concluded that the Appellant had not misrepresented her supervision needs in the relevant claim. As already noted, both parties then applied for permission to appeal to the Upper Tribunal from the Tribunal's decision of April 15, 2016.

50. The Secretary of State's sole ground of appeal was that if there had been no misrepresentation of care needs in the 2003, it followed there could be no grounds to revise the decision in question. Rather, that part of the award (for care) should have been superseded from a different date and under different regulations (pp.1236-1237). There was therefore a contradiction in the Tribunal's decision.

51. The Appellant's detailed and lengthy grounds (pp.1239-1245), although arguing there had been errors of law and referring to several decisions of the Social Security Commissioners, appear for the most part to have taken issue with the Tribunal's findings of facts and reasons.

52. As both parties claimed there were errors of law, the District Tribunal Judge had no option but to set aside the decision of April 15, 2016 (p.1266). This was because section 13(3) of the Social Security Act 1998 provides as follows:

> "(3) If each of the principal parties to the case expresses the view that the decision was erroneous in point of law, the First-tier Tribunal shall set aside the decision and refer the case for determination by a differently constituted First-tier Tribunal."

53. The learned commentators of *Social Security Legislation 2016/17*, Volume III, *Administration, Adjudication and the European Dimension* (by M. Rowland and R.

White) describe section 13(3) as “a strange provision” (p.251), noting both that the parties may not agree on the alleged error of law (as indeed was the case here) and yet the judge must set the decision aside, however unreasonable those views are: “It would be unobjectionable if it conferred a *power* to set aside a decision with which all partiers were dissatisfied but it is the duty to do so that creates the difficulty” (p.252). Social Security Commissioner’s decision CIB/2949/2005 confirms (at paragraph 7) that section 13(3) confers a duty and not a power.

54. This case is an object lesson in why section 13(3) of the Social Security Act 1998 is a less than helpful provision. It would have been far more satisfactory had the District Tribunal Judge had a discretion as to whether e.g. to review the decision or grant permission to appeal to the Upper Tribunal. As it is, those routes were closed down by the absolute terms of section 13(3).

Conclusion

55. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new Tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

56. I hope I do not see this case again.

Signed on the original
on 12 September 2017

Nicholas Wikeley
Judge of the Upper Tribunal