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 Cheltenham First-tier Tribunal dated July 19, 2016 under file reference SC189/16/00020 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal in a position to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> *The Appellant's appeal is allowed. The Secretary of State's decision of October 30, 2015 is set aside. The Appellant is entitled to the enhanced rate of the daily living component of PIP from July 8, 2013 to July 7, 2016 and to the enhanced rate of the mobility component of PIP from July 8, 2013 to July 7, 2016. This is because she scores 20 points for daily living activities and 14 points for mobility. In other words, the decision of the First-tier Tribunal dated June 24, 2014 must be reinstated. This decision is without prejudice to the outcome of any renewal claim in respect of the period going forward from July 8, 2016.*

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

REASONS FOR DECISION

The wider lessons of this Upper Tribunal decision

1. The history of this appeal is really quite scary. This decision amply demonstrates why it is so crucially important that First-tier Tribunals examine with some care the decision-making history on the Appellant's claim when dealing with an appeal about entitlement to personal independence payment (PIP).

The background to this appeal to the Upper Tribunal

2. On December 11, 2013 the Secretary of State refused the Appellant's PIP claim with effect from July 8, 2013. The decision maker scored her at 7 points for daily living and 4 points for mobility. The Appellant appealed.

3. On June 24, 2014 the First-tier Tribunal (from now on FTT 1), chaired by Judge Solly, allowed the Appellant's appeal, making an award of the enhanced rate of both components for the period from July 8, 2013 to July 7, 2016. FTT 1 decided that the Appellant scored 20 daily living points and 14 mobility points. As well as hearing from the Appellant, FTT 1 had extensive expert medical evidence in the papers before it.

4. On July 7, 2014 the DWP wrote to the Appellant, confirming the award by FTT 1, but adding that "we'll contact you after 8 July 2015 to make sure you're receiving the right level of Personal Independence Payment".

5. In July 2015 the DWP accordingly sent the Appellant what was in effect a PIP review form, which she duly filled in and returned. She also underwent a PIP medical assessment on October 19, 2015. On October 30, 2015 a decision maker decided that the Appellant qualified for the standard rate of the daily living component (scoring 8 points) but no award of the mobility component (scoring 4 points) for the period from that date to October 18, 2021.

6. The Appellant asked for a mandatory consideration and subsequently an appeal, adding:

> "I request that any decision contrary to that made in Tribunal on 24-06-14 is held in abeyance until proper expert medical opinion is gathered, not a 2 hr assessment on one day by a paramedic."

7. On April 6, 2016 a second tribunal (FTT 2) allowed the Appellant's appeal against the decision dated October 30, 2015. FTT 2 awarded the standard rate of both components, scoring the Appellant at 9 daily living points and 10 mobility points. This award covered the period from October 30, 2015 to October 29, 2016. The Secretary of State applied for a statement of reasons and at the same time the Appellant applied for FTT 2's decision to be set aside.

8. On May 5, 2016, a District Tribunal Judge refused the Appellant's set aside request. Having received a copy of the statement of reasons, the Appellant's then CAB representative applied for permission to appeal to the Upper Tribunal, arguing that there had been various procedural failings and also that FTT 2 had failed to explain adequately its findings as regards the Appellant's mobility.

9. On June 21, 2016 the same District Tribunal Judge reviewed and set aside FTT 2's decision on the basis that there was indeed an error of law in that there were insufficient findings of fact as regards mobility descriptor 2. A new hearing before a fresh panel was directed.

10. On July 19, 2016 a third tribunal (FTT 3) allowed the Appellant's re-heard appeal against the Secretary of State's decision dated October 30, 2015. FTT 3 awarded the standard rate of the daily living component, scoring the Appellant at 10 daily living points, but made no award of the mobility component, scoring 4 points. By now the file ran to nearly 300 pages, including documents going right back to the original 2013 claim, and so including the documentary evidence put before FTT 1.

11. The District Tribunal Judge subsequently refused both an application to set aside and an application for permission to appeal from the Appellant. Her new representative renewed the latter application to the Upper Tribunal.

The proceedings before the Upper Tribunal

12. I gave permission to appeal in the following terms.

> "1. On the face of it, the Appellant's grounds of appeal are not particularly persuasive. The first three grounds of appeal (paras 2-4) take issue with descriptors 1e and 3c, but points for those self-same descriptors were actually awarded by the First-tier Tribunal, so it is difficult to see the purpose of those grounds.
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> 2. The other three grounds of appeal (paras 5-7) are arguable. It is also arguable that the relevant First-tier Tribunal ("the July 2016 Tribunal") should

have made further findings and/or given reasons as regards activity 9 (engaging with people face to face). I say that as points were awarded on that basis by the previous Tribunal of 6 April 2016 (p.256), whose decision was subsequently set aside. The CAB submission had also raised that as a live issue (p.276).

3. There is, however, a far more fundamental problem with the First-tier Tribunal's decision, or so it seems to me. An earlier First-tier Tribunal on 24 June 2014 ("the 2014 Tribunal") had awarded the Appellant 20 points for daily living and 14 points for mobility, resulting in an award of the enhanced rate of PIP for both components. The 2014 Tribunal had awarded both components for a 3 year period from 08/07/2013 to 07/08/2016. So far as I can see from the file, there was no appeal by the Secretary of State against that decision. It was implemented by letter dated 7 July 2014 (p.120).

4. The Secretary of State's decision under appeal before the July 2016 Tribunal was a decision dated 30 October 2015 (p.216). This was plainly not a decision on a renewal claim with effect from August 2016, following the expiry of the award by the 2014 Tribunal; it is described as a "planned review" decision. If so, as there was an extant PIP award, then it followed that the Secretary of State had to show grounds for supersession – see e.g. *SF v Secretary of State for Work and Pensions (PIP) (Revisions, supersessions and reviews: supersession: general)* [2016] UKUT 481 (AAC) and see also decision CIP/1623/2016 (awaiting neutral citation number as *KB v SSWP (PIP)*).

5. That being so, the July 2016 Tribunal was surely wrong to say that as the Appellant's case "is being reviewed, it is effectively treated as a new claim and she has to demonstrate that she met the statutory criteria entitling her to PIP at the date of the decision on 30th October 2015." (statement of reasons, para [5], p.284). That is the wrong way round.

6. However, the problem is even more serious than that. This is not a case where an existing award of PIP by a decision maker has been overturned during its projected term. It is a case where a Tribunal's decision has been overturned. In that context regulation 31 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381) is surely relevant. That provides as follows:

> "**Tribunal decisions**
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> 31. The Secretary of State may supersede a decision of the First-tier Tribunal or Upper Tribunal which—
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> (a) was made in ignorance of, or was based upon a mistake as to, some material fact; or
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> (b) in a case where section 26(5) (appeals involving issues that arise in other cases) of the 1998 Act applies, was made in accordance with section 26(4)(b) of that Act."

7. I can see no evidence that either (i) the Departmental submission to the July 2016 Tribunal drew attention to this provision or (ii) the July 2016 tribunal considered the provision of its own accord. In what way did the 2014 Tribunal make a mistaken decision or one in ignorance?

8. On that basis it seems plain that the July 2016 Tribunal erred in law. Unless I hear compelling argument to the contrary, I am minded to allow this appeal, set

> aside the decision of the July 2016 Tribunal (and the Secretary of State's decision of 30 October 2015) and in effect reinstate the decision of the 2014 Tribunal. I therefore give permission to appeal. The abbreviated case management directions that follow explain what happens next."

13. Mr Kevin O'Kane, who now acts for the Secretary of State in these proceedings, and Mr Andrew King, the Appellant's representative, are both content that the appeal is allowed and FTT 3's decision re-made as indicated above. I agree and accordingly find that the Tribunal's decision involves an error of law for the reasons set out above and should be set aside and accordingly re-made. But first I need to spell out in a little more detail what went wrong.

This really should never have happened

14. I recognise that the Secretary of State's written response to an appeal to the First-tier Tribunal is not always satisfactory. I recognise also that the accompanying papers relating to the appeal may well sometimes be incomplete. So First-tier Tribunals by force of circumstances may often be required to engage in some documentary detective work in order to understand the issues raised by the appeal.

15. In this case the Secretary of State's response to the Appellant's appeal to the First-tier Tribunal was in a template form (a template described by Judge Wright in *PM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0037 (AAC) at paragraph 8 as "woeful and wholly inadequate"). This response at Section 3 ("the decision under appeal") did at least correctly identify the date and effect of the decision under appeal. To be fair, Section 3 also mentioned the previous decision, although it did not say who had made it or when it was made. Again, to be fair, Section 5 ("Claimant's reasons for appeal") quoted directly from the Appellant's appeal form, in which she had argued the decision of October 30, 2015 was "incorrect factually, dates, medically, [and has] overridden a decision set [in] place by Judge Solly and panel 2014 of which is true and correct even to this date".

16. However, the Secretary of State's response (to FTT 2 and FTT 3) countered this by stating that although the Appellant "was previously getting the enhanced rate of both components of PIP, the Decision Maker is entitled to reach their decision based on the current up-to-date evidence and is not bound in any way by the previous decision made." This statement was at best misleading and at worst simply wrong.

17. In fairness to the Secretary of State – and I am trying very hard to be fair – the response undoubtedly included all the available evidence and copies of relevant decisions made since the original PIP claim in 2013.

18. However, whatever the deficiencies of the Secretary of State's response, I find the approach of both FTT 2 and FTT 3 to this appeal extremely disturbing. As Judge Wright observed in *PM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0037 (AAC) at paragraph 6, "the very inadequacy of the respondent's appeal response ought to have been the catalyst for the tribunal investigating what was before it."

19. The decision of FTT 2, of course, has already been set aside and so is not technically before me now. Although it produced a lengthy and in many ways detailed statement of reasons, FTT 2 completely failed to note that the Secretary of State's decision of October 30, 2015 had been made during the currency of the PIP award by FTT 1, let alone consider its consequences.

20. The statement of reasons from FTT 3, which is before me, was in some ways even worse. It did manage to recognise that there had been an award by FTT 1, before noting merely that "the respondent decided to review this decision" and then perversely putting the burden of proof on the Appellant to make out her entitlement.

21. I am not sure which approach is more egregious. I recognise that this was a factually complex case. However, an essential part of preparing for and previewing an appeal is to identify the decision under appeal and the process by which it had been arrived at. FTT 3 (and indeed FTT 2 for that matter) plainly failed to undertake that elementary but essential task. It seems to me that here are only two possible reasons for this omission.

22. The first is that the tribunals simply failed to realise that a live issue was raised by the Secretary of State's decision to withdraw the Appellant's entitlement to PIP part way through the currency of the award by FTT 1.

23. The second is that the tribunals appreciated that there was an issue but assumed that it was unproblematic, e.g. because regulation 11 of the Social Security (Personal Independence Payments) Regulations 2013 (SI 2013/377; "the 2013 Regulations") enables the Secretary of State "for any reason and at any time" to "determine afresh … whether [the claimant] continues to have such limited or severely limited ability" to carry out the relevant PIP activities. If so, the tribunals were clearly and seriously mistaken – as Judge Mesher put it, "regulation 11 does not directly allow a supersession of decision making an award whenever the Secretary of State feels like it" (see *KB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 537 (AAC) at paragraph 17 and see also *DS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 538 (AAC)).

24. Either way, both tribunals must have overlooked section 17(1) of the Social Security Act 1998, one of the fundamental tenets of the social security adjudication system, which provides for the finality of decisions (subject to the process of revisions, supersessions and appeals as provided for by that Act and the Tribunals, Courts and Enforcement Act 2007). So what did the Secretary of State think he was doing by making the decision of October 30, 2015?

25. As noted above, there had been no *appeal* by the Secretary of State against the decision of FTT 1.

26. Further, the Secretary of State has no power to revise a decision by a First-tier Tribunal. The revision powers may only be exercised in relation to an earlier decision by the Secretary of State (see regulations 5 and 8 of the 2013 Regulations). So *revision* was off the table.

27. It follows that the Secretary of State could only interfere with FTT 1's decision by way of making a *supersession* decision. On the face of it this might have been undertaken in one of two ways.

28. The first is under regulation 31 of the 2013 Regulations, as I noted when giving permission to appeal. However, the extensive papers before both tribunals included only the decision notice (and subsequent DWP implementing letter) from FTT 1. In the absence of both a record of proceedings and statement of reasons for FTT 1, it is difficult to see how the Secretary of State could ever have discharged the burden of showing that FTT 1 had made its decision "in ignorance of, or … based upon a mistake as to, some material fact" for the purposes of regulation 31. That was the

precisely the point which the Appellant had made in lay terms in her notice of appeal (see paragraph 15 above).

29. The second was under regulation 23(1) of the 2013 Regulations, which allows the Secretary of State to make a supersession decision where there had been "a relevant change of circumstances since the decision to be superseded had effect". This was presumably the argument the Secretary of State's response to the appeal was seeking to make, although it was not articulated as such. However, it is well established that a new medical opinion (or paramedic's opinion) is not of itself a change of circumstances, although it might be evidence of underlying changes in a medical condition which could constitute a change of circumstances (see e.g. *Cooke v Secretary of State for Work and Pensions* [2001] EWCA Civ 734, reported as R(DLA) 6/01). In this case there was a singular absence of hard information about what FTT 1 had decided, other than the headline decision, meaning that the Secretary of State's task in demonstrating a change of circumstances was not straightforward. In any event, the Appellant's argument was clearly that there had been no such change and FTT 3 certainly failed to put the Secretary of State to proof. Indeed, quite the opposite.

30. All in all, this is a pretty sorry tale.

Conclusion

31. 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)). I re-make the decision as above, in effect reinstating the decision of FTT 1 (section 12(2)(b)(ii)).

Signed on the original
on 2 February 2017

Nicholas Wikeley
Judge of the Upper Tribunal