IN THE UPPER TRIBUNAL **Appeal No: CPIP/2631/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Leeds on 20 June 2019 under reference SC009/19/00204 involved an error on a material point of law and is set aside.

The Upper Tribunal is not able to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal.

Subject to the provisions of the 'Chamber President's Guidance Note No.3 (SSCS) *Contingency Arrangements and Composition of Tribunals on or after 24th March 2020 pursuant to the Pilot Practice Directions dated 19th March 2020*' (if still in place at the relevant time), the appeal should be decided afresh only after an oral hearing of the appeal.

(*In the present Covoid-19 emergency it may be that such a hearing will need to be conducted by telephone or by video conferencing (e.g. Skype).*)

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

REASONS FOR DECISION

1. Given the arguments made on this appeal, I am satisfied that the First-tier Tribunal erred in law in its decision of 5 November 2019 ("the tribunal") and that its decision should be set aside. This, I should make clear at the outset, is **not** on the ground of appeal on which I gave permission to appeal but on the different ground advanced by the Secretary of State.

2. In very general terms, the appeal to the tribunal concerned the Personal Independence Payment (PIP) and in particular whether the claimant satisfied the criteria for an award of the mobility component of PIP. However, this generality masks the more complicated and important history behind the appeal and in particular the legal basis on which the 5 March 2019 decision[1] under appeal to the tribunal was 'reconsidering' the PIP awarding decision of 8 November 2016.

3. The awarding decision of 8 November 2016 had found the appellant was entitled to the standard rate of the daily living component of PIP, but neither rate of the mobility component, from 7 September 2016 to 26 October 2026. Beyond seeking a 'mandatory reconsideration' of this decision, which affirmed the decision on 26 November 2016 (page 177), from the papers before me it appears that the appellant did not seek to challenge this decision any further on appeal. Nor did she take any steps to have the 8 November 2016 changed under the supersession rules at any date thereafter.

4. What then caused the 8 November 2016 decision to be looked at again but not changed by the Secretary of State's decision of 5 March 2019?

5. The first part of the answer to this question, in short, is two three-judge panel decisions of the Upper Tribunal. The first three-judge panel decision is *MH -v SSWP* (PIP) [2016] UKUT 531 (AAC); [2018] AACR 12, decided on 28 November 2016, and the second is *RJ, GMcL and CS v SSWP* (PIP) [2017] UKUT 105 (AAC); [2017] AACR 32, which was decided on 9 March 2017. After failed attempts at legislation to reverse the perceived effects of the decision in *MH* and the abandoning of an appeal against *MH*, the two decisions became the settled view of the law on the issues they had determined. However, the effect of the 'anti-test case rule' in section 27 of the Social Security Act 1998 ("the Act") meant that neither of the two decisions could apply to the appellant for

[1] See page 184 – the appeal response to the tribunal wrongly gives this date as 19 March 2019.

the periods prior to the dates on which they had been made. Accordingly, the appellant, for example, could only benefit, if at all, from *MH* from 28 November 2016.

6. However, by the time *MH* had been decided, the appellant already had in place the decision of 8 November 2016 awarding her PIP. By section 17 of the Social Security Act 1998 this was a final decision, covering her entitlement to PIP from 7 September 2016 to 26 October 2026, which could only be changed by way of revision, supersession or appeal. But as I have already recounted, beyond the 'mandatory reconsideration' (i.e. revision) route, which affirmed (i.e. did not revise) the 8 November awarding decision two days before *MH* was decided, the appellant took no steps to change or challenge that 8 November 2016 'final' decision.

7. This leads to the second part of the answer to the question posed in paragraph 4 above. The Secretary of State exercised her decision-making powers in October 2019 under the Social Security Act 1998 ("the Act") to 'look again' at her 8 November 2016 decision given the changed understanding of the law brought about by the *MH* and *RJ* decisions. The only two applicable decision-making powers were 'revision', under section 9 of the Act, and 'supersession', under section 10 of the Act. Only supersession could have been applicable in this case though the reasons why that is so in respect of the *MH* decision may be less obvious.

8. The *RJ* decision was made more than one month after the 8 November 2016 awarding decision. The supersession ground in respect of *RJ* would seem to have arisen under regulation 24 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013 ("the DMA Regs 2013") as a supersession for 'error of law'. Regulation 35(5) of the DMA Regs 2013 provides in such circumstances, but where the error of law has been revealed by the 'test case' giving rise to the application of section 27 of the Act, that the supersession decision takes effect from the date of the 'test case', here

the 9 March 2017 date of the decision in *RJ*. However, it may be that the *RJ* decision is of less importance on this appeal. It certainly did not feature to any extent in the tribunal's consideration, which is confirmed by its reference (see below) to the only effective date before it being "in 2016". But if *RJ* had, or has, any relevance on this appeal, it can only be from 9 March 2017.

9. The position in relation to the *MH* decision may appear less obvious in terms of supersession on this appeal because less than one month had passed between the date of the awarding decision on 8 November 2016 and *MH* being decided on 28 November 2016. On this basis the Secretary of State *could* have revised her awarding decision on any ground under regulation 5 of the DMA Regs once *MH* had been decided, though the effective date for any change would have remained as 28 November 2016 given the strictures of section 27(3) of the Act. However, the Secretary of State did not do this and had made her mandatory reconsideration decision not to revise the awarding decision before *MH* was decided.

10. Although regulation 9 of the DMA Regs 2013 allows for a decision to be revised at any time on the basis of, inter alia, "official error", it is not immediately apparent to me on what basis this could be said to apply to decisions made before *MH* was decided, including the two decisions in this case referred to immediately above, as those decisions were made on the basis of the law as it was understood to be at that time. Further and in any event, but consistent with section 27 of the Act, the definition of 'official error' in regulation 2 of the DMS Regs 2013 excludes any error of law shown to be been such an error by a subsequent decision of the Upper Tribunal or a court. On this basis the awarding decision and the mandatory reconsideration decision could not be said to have been made in error of law based on the subsequent decision in *MH*.

11. Further, as far as I can see regulation 9 of the DMA Regs has no application to a *failure* to make a revision decision after *MH* had been

decided but before the one month time for an 'any grounds' revision under regulation 5 of the had expired. For regulation 9 to operate it still has have a decision that it can revise.

12. Given the above points about revision, it is supersession which must be the relevant decision-making power in respect of the *MH* decision, and the same would apply to it as I have described for *RJ* in paragraph 8 above, save that the supersession ground, if made out, would take effect from the 28 November 2016 date on which *MH* was decided.

13. The above analysis explains why I was wrong in giving permission to appeal on the ground that I did. I gave the appellant permission to appeal on the following basis:

> "I consider that it is strongly arguable that the First-tier Tribunal erred materially in law in misdirecting itself that the effective date of the decision for its consideration was in 2016 rather than 2019. As a consequence, it very arguably wrongly focused its attention on whether [the appellant] was able to follow a route in 2016 (see paragraph four of its reasons and the A1 driving incident) rather than on how she was affected on such routes in 2019. The Secretary of State's decision under appeal was dated 5 March 2019 (page 184) and on its face was a decision refusing to supersede (i.e. refusing to change) from 5 March 2019 the awarding decision of 8 November 2016 (page 169). Entitlement to PIP from 2016 was therefore not in issue on the appeal."

14. The appellant was, understandably, content for her appeal to the Upper Tribunal to be allowed on the ground I had suggested above. The Secretary of State, however, did not support this ground, but she argued instead for an alternative ground on which she said the appeal should be allowed. Her arguments unpacked as follows:

> "2. In order to respond to the observations of the UT Judge it may help in setting out a brief chronology. The claimant made a PIP claim on 07/09/16 by telephone. A PIP2 questionnaire was received on 04/10/16 and the claimant underwent a face to face consultation on 27/10/16. The claimant was awarded the standard rate of the daily living component as she scored 10 points. The claimant was awarded 4 points for the mobility component but this did not meet the minimum number of points required to result in entitlement an award of the mobility component. As the claimant did not satisfy the minimum number of points between 8 and 11

for the daily living component and the mobility component, a disallowance decision letter dated 08/11/16 was issued to the claimant. The claimant requested mandatory reconsideration on 14/11/16, however upon reconsideration the decision remained unchanged and a mandatory reconsideration decision letter dated 26/11/16 was issued.

3. The claimant was awarded PIP on 08/11/16 solely at the standard rate of the daily living component. A decision maker acting on behalf of the Secretary of State had reviewed this decision on 05/03/19 in light of the Upper Tribunal decision MH v SSWP [2016] UKUT 0531 (AAC), in order to determine the claimant's entitlement to the mobility component from 2016 as set out through pages E – F of the underlying submission. As confirmed in the decision letter dated 05/03/19 the decision maker did not change the award from 08/11/2016. Returning to the observations made by Judge Wright at paragraph 2 of the grant of permission to appeal, as the decision maker was considering the claimant's entitlement to the mobility component from the award commencing in 2016 I submit that the Tribunal did not err in law in focusing its fact finding to the claimant's ability to follow the route of a journey in 2016. That is because the 5 March 2019 decision was a decision not to supersede the award decision of 8 November 2016.

4. However, did the Tribunal provide adequate reasons for its decision to refuse the appeal? I submit that it did not. The claimant had reported in her PIP2 questionnaire that she suffers from vestibular disorder [page 8], which resulted in her experiencing off balance symptoms and severe anxiety related to this. The claimant had stated in her PIP2 questionnaire that she would sometimes abandon her shopping visits [page 31], further stating in her request for mandatory reconsideration that she has experienced agoraphobic symptoms since childhood [page 77]. The claimant's reported mental health difficulties seem to have been accepted by the Tribunal with it having found that her GP had identified her as suffering "*severe anxiety from vertigo*". The claimant's GP has also reported that they have been looking after her for a number of years related to her anxiety. As one can see there was sufficient evidence before the Tribunal indicating the presence of "severe anxiety" and agoraphobic like symptoms in the claimant. Given the evidence before it the Tribunal should have explored the claimant's mental health difficulties and the impact this has on her ability to follow the route of a journey.

5. In further evidence, as one can read from the brief SoR the Tribunal has evidently focused on a single instance of the claimant experiencing difficulties with planning and following the route of a journey in 2016 which it found was her "*last panic attack*", a finding which has subsequently been disputed by the claimant in her grounds of appeal to the Upper Tribunal. I submit that in focusing on one particular instance of the claimant experiencing a panic attack the Tribunal has limited its fact finding and has arguably failed to consider the claimant's mental health difficulties and her ability to follow the route of a journey on the majority of days in accordance with regulation 7 of the Personal Independence Payments Regulations 2013. As noted in the various medical evidence provided by the claimant she experiences a state of anxiety with symptoms similar to agoraphobia, however other than a brief reference to anxiety in the SoR the Tribunal does not appear to take this into consideration and has failed to make findings on relevant matters to the appeal. It is my

> submission that this amounts to a material error in law. Therefore, I respectfully request that the appeal be remitted and reheard by a different tribunal."

15. Again, unsurprisingly, the appellant claimant is content to agree with the Secretary of State's reason for supporting the appeal.

16. For the reasons I have endeavoured to give above, I now broadly concur with what the Secretary of State says in paragraph three of her submission quoted above. This is subject to a number of caveats. First, what is said by the Secretary of State at the end of paragraph two of her submission is obviously wrong insofar as it recounts that no award of the daily living component of PIP was made under the 8 November 2016 decision. Second, the reference to 'review' in paragraph three of the submission needs to be treated with caution as it is not a legal term of art found in parts of the Act dealing with the Secretary of State's decision making powers. Third, this lack of precision and care in the use of language has also affected the focus on the effective date in relation to *MH*. The issue was not about superseding or changing the awarding decision from its date of 8 November 2016 (even if supersession more generally could legally perform this task). Even less was it about the appellant's ability to 'follow a route' generally "in 2016": her ability to do so in, say, February 2016 was plainly not before the tribunal. The issue before the tribunal in respect of the refusal to supersede decision under appeal to it of 5 October 2019 was whether the appellant's award of PIP ought to be superseded from 28 November 2016 because of the changed understanding of the applicable law brought about by *MH*. Fourth, the submission makes no reference to the *RJ* decision.

17. However, I also concur with the Secretary of State, for the reasons she gives in paragraphs 4 and 5 of her submission to the Upper Tribunal, that the tribunal's reasoning, covering three short paragraphs, was inadequate to explain why the appellant did not qualify for even an award of four points under mobility activity 1 of PIP. This failure is

sufficient to render the decision erroneous on a material point of law and merits it being set aside.

18. In addition, insofar as the tribunal did touch on the decision-making history in its findings of fact or reasons for its decision, in my judgment it misdirected itself as the correct dates for its consideration by (i) ignoring *RJ* altogether, and (ii) focusing wrongly on the 8 November 2016 date of the awarding decision as the relevant date. The latter is shown by the following passage from the tribunal's reasoning:

> "4. The Tribunal considered whether there was any problem in planning a journey. The relevant date for such consideration, is of course, 2016, the date of the decision. The appellant told the Tribunal that in 2016 she undertook a journey on the A.1 to Durham……This was her last panic attack."

19. For the reasons given above the appeal is allowed and the tribunal's decision set aside.

20. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

21. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether her appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

Dated 9th July 2020
(The above is the date this decision was made. It may however take some time to be issued given the current Covid-19 medical emergency and the limited staffing of the UTAAC's office in London.)