



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CPIP/729/2021

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

AS

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decision date: 20 January 2022
Decided on consideration of the papers

Representation:

Appellant: N/A
Respondent: N/A

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 17 September 2020 under number SC236/19/00659 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The First-tier Tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.**

3. The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 17 September 2020.
4. Copies of this decision, my decision granting permission to appeal in these proceedings, and the Secretary of State's submission on this appeal should be included in the appeal bundle before the panel of the First-tier Tribunal dealing with the remitted appeal.
5. In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: R(DLA) 2 & 3/01.
6. If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction 5 above).
7. The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.

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

Background

1. This is an appeal by the Appellant against a decision of the panel of the First-tier Tribunal which heard her appeal at Sunderland on 17 September 2020 (the "**Tribunal**"; the "**FtT Decision**") to uphold and confirm the Respondent's decision of 07 February 2019 that the Appellant was not entitled to any award of Personal Independence Payment ("**PIP**") with either component at any rate from and including 10 October 2018.

The permission stage

2. The Appellant applied to the First-tier Tribunal for permission to appeal the FtT Decision, but this was refused.

3. The Appellant then exercised her right to renew her application before the Upper Tribunal and the matter came before me.

4. On 28 May 2021 I considered the permission application and I gave the Appellant permission to appeal to the Upper Tribunal. In my grant of permission (which was addressed to the Appellant) I said:

"8. Much of what your representative says in the application for permission to appeal is directed not at the FtT Decision but rather at the decision to refuse to set aside the FtT Decision. That decision is not the decision under appeal. The relevant decision is the FtT Decision. I can only give permission to appeal if

the FtT Decision involved the making of a material error of law. No defects in the set aside decision can establish an error of law in the FtT Decision.

9. However, I am persuaded that it is arguable with a realistic prospect of success that the Tribunal failed to consider in sufficient depth whether to agree to the adjournment application or to proceed to determine the appeal in your absence given both your longstanding diagnosis of schizophrenia (which it accepted), given your representative's submission that further evidence relating to your claim history should be obtained, and given that you were willing to wait until a face-to-face hearing could be listed (notwithstanding the uncertainty around this due to the public health situation).

10. The Tribunal's reasoning is set out in paragraphs 9 to 12 (inclusive) of its statement of reasons. I am satisfied that it is arguable with a realistic prospect of success that it was incumbent on the Tribunal to explain in greater depth its reasons for deciding to proceed to determine your appeal."

5. I issued Case Management Directions inviting the Respondent to comment on the appeal and I provided the Appellant with an opportunity to respond to any comments of the Respondent.

The Respondent's submissions

6. Mr Spencer, on behalf of the Respondent, provided clear, succinct and helpful written submissions in support of the appeal, inviting me to set aside the Decision and to remit the appeal for rehearing by a differently constituted panel of the First-tier Tribunal with appropriate directions for its redetermination.

The Appellant's response

7. The Appellant's representative, Mr Guy, responded to thank the Secretary of State for supporting the appeal but had no further comment to make on the issues.

Why there was no oral hearing of this appeal

8. Neither party asked for an oral hearing. Having considered the paper file I could see no compelling reasons to hold an oral hearing and I was satisfied that the interests of justice did not require one. I therefore decided to determine the appeal on the papers alone.

My decision

9. At the permission stage I had to be persuaded only that it was arguable with a realistic (as opposed to fanciful) prospect of success that the Tribunal had erred in law in a way which was material. At this stage I need to be satisfied on the balance of probabilities that the Tribunal did so err.

10. The health care which the Appellant receives (including prescription of anti-psychotic and anti-depressant medication) rendered her a "vulnerable adult" for the purposes of the hearing before the Tribunal (see RT v Secretary of State for Work and Pensions (PIP) [2019] UKUT 207 (AAC) ("**RT v SSWP**"). This made the Senior President of Tribunals' Practice Direction on 'Child, Vulnerable Adult and Sensitive Witnesses' (the "**Senior President's Practice Direction**"). This provides (among other things) that:

"2. A child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the Tribunal determines

that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so.

3. In determining whether it is necessary for a child, vulnerable adult or sensitive witness to give evidence to enable the fair hearing of a case the Tribunal should have regard to all the available evidence and any representations made by the parties.

4. In determining whether the welfare of the child, vulnerable adult or sensitive witness would be prejudiced it may be appropriate for the Tribunal to invite submissions from interested persons, such as a child's parents.

[...]

6. The Tribunal must consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness.

7. It may be appropriate for the Tribunal to direct that the evidence should be given by telephone, video link or other means directed by the Tribunal, or to direct that a person be appointed for the purpose of the hearing who has the appropriate skills and experience in facilitating the giving of evidence by a child, vulnerable adult or sensitive witness.”

11. The Tribunal's statement of reasons gives a fairly detailed account (in paragraphs 4 to 12 inclusive) of the Tribunal's decision-making on whether to agree to Mr Guy's application for an adjournment of the hearing given the anxiety that he said prevented his client from being able to participate in a remote oral hearing. The Tribunal refers to the overriding objective (see paragraph 9 of its statement of reasons) but it doesn't refer, or allude to, the Senior President's Practice Direction. It appears that, as Mr Spencer suggests, the Tribunal wholly overlooked the requirements of the Senior President's Practice Direction, or did not consider that it applied and to do so (at least without adequate explanation of why it considered that no measures were required) amounts to an error of law, as Judge Poynter reluctantly concluded in RT v SSWP.

12. Further, the Tribunal's reasoning as to why it was “reasonable” for the Appellant to engage with the Tribunal by telephone was flawed. The Tribunal drew an equivalence between the Appellant's ability to speak to her representative on the telephone and an ability to participate in a tribunal hearing by telephone, but it had evidence before it which should have given it pause for thought: Mr Guy had emailed the First-tier Tribunal on 19 August 2020 (in an email which can be found at page 171 of the appeal bundle) to request a postponement of the scheduled telephone hearing and instead staying the appeal until it could be heard face to face at a tribunal venue, stating:

“I have spoken by telephone to the client today. I can confirm her ability to communicate by telephone is poor. She suffers from severe and enduring mental health problems including schizophrenia. She has told me she is very nervous and apprehensive about a telephone hearing and does not think she will be able to take a full part and adequately explain her difficulties. She also feels that she needs her representative present to give her confidence and emotional support. I have explained that there will be a considerable delay but she is happy to wait.”

13. While the Tribunal was not bound to accept Mr Guy's evidence about the Appellant's particular difficulties with participating in a telephone hearing its reasons

for refusing Mr Guy's application indicate that the Tribunal took an overly rigid and unsympathetic approach to the Appellant's accepted mental health difficulties.

14. This falls short of a proper examination either of the specific issues highlighted by the Senior President's Practice Direction or the general duty to ensure, so far as practicable, that the parties are able to participate fully in proceedings (rule 2(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008).

15. For the reasons set out above I now find that the Tribunal did indeed err in law, and I am satisfied that the error was material in the sense that had the error not been made the outcome of the appeal may well have been different.

It is necessary for further facts to be found. The First-tier Tribunal is best placed to evaluate the evidence and to make appropriate findings of fact. It is appropriate to remit this appeal to be reheard by a fresh panel of the First-tier Tribunal.

JUDGE THOMAS CHURCH
Judge of the Upper Tribunal
authorised for issue on 20 January 2022