IN THE UPPER TRIBUNAL **Appeal No.** UA-2021-000448-DLA
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

K.H.

Appellant

by

C.H.

Appointee

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley
Decision date: 15 November 2022
Decided on consideration of the papers

Representation:
Appellant: Her father (and Appointee)
Respondent: Mr Daniel Decker, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 26 February 2021 under number SC236/19/00932 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and re-make the decision originally under appeal as follows:

> ***The Appellant's appeal (SC236/19/00932) to the First-tier Tribunal is allowed. The Respondent's decision of 18 April 2019 is revised.***
>
> ***The Appellant is entitled to the middle rate of the DLA care component for the period from 23 April 2019 to 22 April 2021 as she meets the night- time attention condition. The Appellant is not entitled to either rate of the DLA mobility component for the period from 23 April 2019.***

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds.

The Upper Tribunal's decision in summary and what happens next

2. I allow the Appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal involves a legal error. I therefore set aside the Tribunal's decision.

3. I can re-decide the underlying appeal that was before the First-tier Tribunal. There is therefore no need for the appeal to be reheard by a new and differently constituted First-tier Tribunal. Accordingly, I substitute my decision for that of the First-tier Tribunal dated 26 February 2021. My decision is that the Appellant is entitled to the middle rate of the care component of disability living allowance (DLA) as she meets the night-time attention condition, as the Secretary of State's representative now accepts. This award covers the period from 23 April 2019 to 22 April 2021. She is not entitled to either rate of the DLA mobility component with effect from 23 April 2019.

4. It follows that the Appellant is due to be paid arrears of DLA covering that two-year period from April 2019 to April 2021. She should then be invited by the Department to make a renewal claim for DLA for the period from 23 April 2021.

The Appellant in this case

5. The Appellant in this case is a young girl who was born in January 2008. It follows that she was 11 years old at the time of the Department's original decision under appeal (18 April 2019). She was 13 at the time of the First-tier Tribunal hearing (26 February 2021) and so is now aged 14. I refer to her in this decision simply as K in order to preserve her privacy and protect her anonymity. K has several medical conditions relating to her physical and mental health but of particular relevance in this context is that she suffers from the distressing conditions of incontinence and vulvavaginitis.

The background to this appeal to the Upper Tribunal

6. The Appellant has had a series of one- or two-year awards of the highest rate of the DLA care component starting in 2010 (when she was just two). The most recent award was for the one-year period from 23 April 2018 to 22 April 2019. K's father, her Appointee for these purposes, made a renewal claim on her behalf. On 18 April 2019 the Department's decision-maker refused the renewal claim, having reasoned, amongst other matters, that "the help she needs during the night is not substantially above that of a child of the same age would need most of the time. Occasional check and cuddle at night for reassurance should suffice". K's father applied for a mandatory reconsideration of that refusal decision, spelling out in some detail the level of attention provided at night for K. However, the refusal decision was confirmed on mandatory reconsideration.

7. K's father then lodged an appeal on his daughter's behalf, stating that her "care needs have not changed … I cannot understand how her issues / problems are still the same but she now went from high rate (DLA) personal care to not been awarded anything … K is no way like another child of her age".

8. The First-tier Tribunal (FTT) held a remote telephone hearing of the appeal. In its decision dated 26 February 2021, and now under appeal to the Upper Tribunal, the FTT dismissed the appeal and confirmed the original decision not to make a DLA renewal award. The FTT issued a full statement of reasons at the Appointee's request.

9. In terms of findings of fact as to what happened at night, the FTT found:

> 11. Typically, the Appellant is asleep by 9.30 p.m. and sleeps until she tends to wet the bed between 12 a.m. and 3 a.m.. This usually happens once per night, sometimes twice, around the date of decision. On waking, she gets a quick wash down with the showerhead in the bath, a change of sheets, fresh sleepwear, and she is settled back to bed again. Half of the time she settles back fine but the other half she remains unsettled and finds it hard to get back to sleep. The Appellant has tried night pads with an alarm which rings if they get damp but this didn't work. They have not tried to set an alarm e.g. at 12 a.m. to encourage the Appellant to get up and empty her bladder to avoid wetting the bed accidentally. She does not wear incontinence pads at night. The Appellant finds her medical conditions embarrassing and stressful. Her family are extremely supportive of her and do all they can to make things as easy for her as possible.

10. It is only right to say the FTT acknowledged (at paragraph [14] of the statement of reasons) that K's father "gave heartfelt and honest evidence … which the Tribunal found to be both credible and consistent with the medical and other independent evidence in the appeal papers."

11. However, in deciding that the night-time attention condition was not met, the FTT reasoned as follows:

> 15. In this case, the Tribunal found as a matter of fact that the Appellant's most troublesome medical conditions involved managing incontinence and vulvovaginitis, requiring the use of creams and changes of underwear. The Appellant is now at an age where she is independent in managing her medical conditions during the day, as is evidenced by her school. She is assisted by her family in managing these conditions during the night, which is entirely understandable given her family's desire to take away as much of the stress of these conditions as possible. However, the Tribunal considered that with some adjustments to the Appellant's routine, such as alarms, incontinence wear and multiple protective sheets, the night-time needs could be managed independently also. If not, a little more support may be necessary to help the Appellant settle back to sleep but not considerably more than that required for a child of the Appellant's age, without her medical conditions.

12. The District Tribunal Judge subsequently refused permission to appeal.

The permission proceedings before the Upper Tribunal

13. On 20 October 2021 K's father then applied direct to the Upper Tribunal for permission to appeal. He gave his reasons as follows (he was understandably referring to his daughter as being 13, as she then was, rather than aged 11, which she was at the date of the DWP decision appealed against):

> I feel it wasn't took into consideration the information given by us as parents who deal with our child's issues on a daily basis. I'm fully aware that she is a child of 13, but you cannot expect a 13 year old child to change her bedding at least twice a night by herself along with having to wash yourself down so not to smell of urine. These episodes are very upsetting for her, then this affects her getting back to sleep and does play a part on her mental health as well as her physical health. I do not feel K is like a child of the same age, as she cannot have sleepovers or sleep out. K does never have a full night's sleep as her bedwetting happens at least twice a night and is showing no signs of getting any better.

14. On 7 February 2022 Upper Tribunal Judge Jacobs directed an oral hearing of the application for permission to appeal. Following an oral hearing in Gateshead, on 1 June 2022, Upper Tribunal Judge Ward gave permission to appeal but limited to the question of the FTT's consideration of K's night needs. Judge Ward's reasoning was as follows (the text is suitably anonymised):

> 2. The FTT found that as K had got older she could be expected to manage her needs herself and that to the extent that residual input from her supportive family was nonetheless required, it was not substantially in excess of what would normally be required by a child of that age.
>
> 3. [K's father] disputes this, specifically in relation to K's need for help at night. Does his disagreement give rise to anything which might realistically be argued to be viewed as an error of law on the part of the FTT?
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> 4. In my view it does, for the following reasons:
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> > a. the FTT (Reasons para 15) considered that with various strategies, K could manage her own care needs at night. However, [K's father]'s evidence is that none of those strategies were put to him during the FTT hearing and that, if he had been asked, he would have explained that all had been tried and failed;
> >
> > b. in consequence, the FTT was unable to get an accurate picture of K's needs for night-time attention and so was unable to give adequate consideration to whether those needs were substantially in excess of those required for a child of K's age without her medical condition.
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> 5. [K's father] accepted that it was not unreasonable to have expected K to manage her needs by day and indeed that she was able to do so.

The appeal proceedings before the Upper Tribunal

15. Mr Daniel Decker, the Secretary of State's representative in these proceedings, supports the appeal to the Upper Tribunal. Furthermore, he invites me to make an award of DLA rather than remit the case for a fresh hearing before a new FTT, although he does not specify the period of the award he had in mind. In those circumstances I think it is helpful to follow the substance of Mr Decker's reasoning in his written submission in its entirety:

> 5. The claimant's father explained on page 113 that he and the claimant's mother needed to change wet sheets, wash the claimant and calm her down multiple times every night. This suggests that the claimant does require a considerable amount of care and attention each night, and much more than an eleven-year-old in normal physical and mental health would require.

6. The tribunal discussed the claimant's medical conditions and the amount of care she might need in paragraph 15 of the SoR. They acknowledged that her most troublesome medical conditions were incontinence and vulvovaginitis, and she is assisted by her family in managing these conditions through the night. However, they decided that she would not need this assistance if some adjustments were made to her routine, such as using alarms, incontinence wear and multiple protective sheets. They found that some additional support might be necessary to help her settle back to sleep, but that this would not be considerably more than a child of the same age in normal physical and mental health would need. I would argue that it is unlikely that most eleven-year-old children in normal physical and mental health would require support to help them settle back to sleep if they wake up during the night.

7. Despite the tribunal's explanation of the ways in which they felt the claimant would be able to avoid the need for requiring additional care or attention through the night, her father said that none of these strategies were put to him during the hearing. He stated that if he had been asked, he would have replied that all of them had been tried, but all had failed and the claimant still required significant amounts of attention at night. This is not stated in the bundle, but he presumably said this at the oral hearing after which permission to appeal was granted.

8. In paragraph 14 of the decision CSE/266/2018, Judge Poole discussed the issue of whether tribunals are required to put their observations to the claimant. They said that there would "*have to be particular circumstances present before it is necessary as a matter of law to put observations made by a tribunal to a claimant*". Examples given of when observations should be put to a claimant included where a new issue arises that was not foreshadowed in the papers and which the claimant had not had the chance to address, and where the observation is going to be determinative in itself, rather than being used to confirm a conclusion the tribunal would probably have reached anyway.

9. Given that the claimant was previously entitled to the highest rate of the care component of DLA, and that the amount of care she requires at night does appear to be significantly higher than most eleven-year-olds in normal physical and mental health, the tribunal's suggestions in paragraph 15 would, in my view, be observations that were determinative in deciding that the claimant was not entitled to DLA. These suggestions had not been raised prior to the hearing, or at least they were not mentioned in the bundle. In my view, the failure to put these suggestions to the claimant's father therefore amounted to an error of law as they seemed to be determinative of the outcome, and if he had been asked about them, he would have put his own evidence forward about these strategies having failed to work before which may have altered the tribunal's decision.

10. Due to the previous award of DLA, the evidence not insinuating that the claimant's conditions have significantly improved since then, and the amount of attention she appears to need at night, especially when compared with an eleven-year-old in normal physical and mental health, I would respectfully invite the UT Judge to set aside this decision and award

> the care component of DLA for night needs only. Otherwise, I would respectfully invite them to remit the case back to the FtT for a rehearing.

16. I agree with the broad thrust of Mr Dekker's argument.

17. In reply, K's father strongly takes issue with Mr Decker's reliance on the decision of Upper Tribunal Judge Poole QC (as she then was, now the Hon. Lady Poole) in *CC v Secretary of State for Work and Pensions [SSWP] (ESA)* [2019] UKUT 14 (AAC), a decision which Mr Decker refers to by its file number of CSA/266/2018. K's father correctly notes that that was an employment and support allowance (ESA) case, whereas his daughter is claiming DLA. That is true, of course, but Mr Decker refers to *CC v SSWP (ESA)* because of the legal principle at issue, and not because of any supposed broader factual similarity between the two cases. This requires some further explanation.

The Upper Tribunal's analysis

18. As Judge Poole QC explained, the appeal in *CC v SSWP (ESA)* was "principally about natural justice, and the circumstances in which tribunals should put specific matters or observations to claimants and invite their comments on them" (at paragraph 1). It is only at that high level of generality that there is any factual comparison between the circumstances of that appeal and the present case.

19. In *CC v SSWP (ESA)* the issue was whether the claimant had been denied a fair hearing as the question of her tearfulness at the hearing, from which the tribunal drew certain inferences, had not been explicitly put to her during the hearing. In the circumstances of that case, Judge Poole QC decided there had been a fair hearing and so no breach of natural justice.

20. In the present appeal the issue is whether the Appellant has been denied a fair hearing as certain points had, it appears, not been put to K's father in the course of the appeal. In particular, to use Mr Decker's formulation, had "the tribunal's explanation of the ways in which they felt the claimant would be able to avoid the need for requiring additional care or attention through the night" been properly put to K's father? Mr Decker's answer to that question was that "the failure to put these suggestions to the claimant's father therefore amounted to an error of law as they seemed to be determinative of the outcome, and if he had been asked about them, he would have put his own evidence forward about these strategies having failed to work before which may have altered the tribunal's decision."

21. Judge Poole QC summarised the governing principles in this way at paragraph 3 of her decision in *CC v SSWP (ESA)*:

> 3.1 Parties before a tribunal are entitled to a fair hearing, conducted in accordance with natural justice. What natural justice requires in any given case varies according to context and circumstances.
>
> 3.2 An aspect of natural justice is the right to be heard. In practice this means parties should have been given notice of the written papers before any hearing. If present at the hearing they should be given a fair opportunity to give evidence on matters in issue, including correcting or contradicting evidence.
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> 3.3 The general position is that, in the context of social entitlement tribunals, natural justice does not demand matters of inference or credibility be specifically put to claimants at oral hearings. Demeanour (including

> tearfulness before the tribunal) also does not have to put to a claimant for specific comment. Claimants who have put particular Activities and Descriptors before tribunals can reasonably expect the tribunal to make observations relevant to those matters, and if appropriate take them into account, without specifically putting them to claimants for comment. Claimants have had papers, and are at the oral hearing with an opportunity to give evidence, so in the normal course none of these matters are capable of characterisation as truly new or taking claimants by surprise.
>
> 3.4 The caveat to this general position is that natural justice is always assessed in the particular circumstances of a case. It will be contrary to natural justice if a case is decided on a basis a claimant had no fair chance to address. Accordingly, when a new matter arises at the hearing, not foreshadowed in the papers, which is determinative of the appeal, then a claimant should be given a reasonable opportunity to be heard about it. In these circumstances specific matters may need to be put to claimants for comment. In keeping with the ethos of the social entitlement chamber, where possible this should done in an enabling manner.

22. In her further illuminating discussion, Judge Poole QC highlighted by way of background some of the different approaches to evidence in the courts and tribunals respectively. She then continued as follows:

> 10. Against this background, I consider that any requirement to put specific matters to claimants for comment in hearings before social entitlement tribunals has to be approached with caution. At the end of the day, the question is one of natural justice. In limited circumstances discussed below, a claimant before a tribunal should be given a specific opportunity to comment on evidence (CIB/1480/1998). But it has to be remembered that the content of natural justice is flexible, and adapts to the form of hearing in which it is being applied (*Lloyd v McMahon* [1987] AC 625 at page 702). Natural justice is not intended to operate to undermine the enabling ethos of social entitlement tribunals.
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> 11. It is helpful to go back to first principles in order to work out when a requirement to put a specific matter to a party will arise. At its core, natural justice demands that a tribunal is not biased, but also establishes that a party has a right to be heard before a decision is reached. “Putting things” to parties, and in particular claimants, is to do with the right to be heard. For a right to be heard to be meaningful, a claimant has to have prior notice and an effective opportunity to make representations (*In re Application for Judicial Review by JR17* [2010] HRLR 27, UKSC at para 50 per Lord Dyson). Parties should therefore have been given notice of the written papers before the tribunal, and if present at the hearing should be given a fair opportunity to give evidence, and to correct or contradict evidence. Where a new matter arises at the hearing which is material, then a claimant should be given a reasonable opportunity to be heard about it. The idea is that a case should not be decided on a basis that a claimant had no fair chance to address. The tribunal may also be put into a better position to make an informed decision if it has relevant information before it. There is no prescriptive way in which this opportunity to be heard should be afforded. In a paper case, it might be given by providing papers and considering written representations if provided. In an oral hearing, a fair hearing might

> be given as a result of the way the hearing was conducted as a whole, where the remit of the hearing has fairly covered matters in issue and the claimant has been given a reasonable opportunity to make representations.

23. In the present case, the FTT plainly took the view that the family could have adopted other strategies which would have enabled K to manage the night-time incidents more by herself. As the FTT explained at paragraph [15] of its statement of reasons, "the Tribunal considered that with some adjustments to the Appellant's routine, such as alarms, incontinence wear and multiple protective sheets, the night-time needs could be managed independently also." There may have been some discussion of such issues at the telephone hearing, as the FTT found as follows (at paragraph [11]): "The Appellant has tried night pads with an alarm which rings if they get damp but this didn't work. They have not tried to set an alarm e.g. at 12 a.m. to encourage the Appellant to get up and empty her bladder to avoid wetting the bed accidentally. She does not wear incontinence pads at night." However, it is unclear whether these findings were based on the documentary evidence on the appeal file or the oral evidence at the telephone hearing. In addition, it is not easy to see how incontinence wear would be appropriate given the real risk of exacerbating the Appellant's vulvavaginitis. Furthermore, Judge Ward noted that the evidence of K's father at the permission hearing was that "none of those strategies were put to him during the FTT hearing and that, if he had been asked, he would have explained that all had been tried and failed". In this context it is important to remember that the FTT had found the Appointee's evidence to be credible.

24. It is in those circumstances, and bearing in mind the principles laid down in *CC v SSWP (ESA)*, that Mr Decker concludes that "Given that the claimant was previously entitled to the highest rate of the care component of DLA, and that the amount of care she requires at night does appear to be significantly higher than most eleven-year-olds in normal physical and mental health, the tribunal's suggestions in paragraph 15 would, in my view, be observations that were determinative in deciding that the claimant was not entitled to DLA". While I would not perhaps put the matter quite as firmly as Mr Decker, given the findings in paragraph [11], there is sufficient ambiguity and uncertainty to agree with him that there was an error of law in the FTT's approach.

25. Finally, I bear in mind that the statutory concept of "attention in connection with [her] bodily functions" includes incidental activities which could be carried out in the absence of the young person concerned (for example, stripping a bed and changing bed linen). As Potter LJ explained in the Court of Appeal's decision in *Ramsden v SSWP* [2003] EWCA Civ 32:

> 37. I do not consider that the decision in *Cockburn* amounts to a formula or litmus test which can be applied as a matter of rote to a case of this kind. Whilst the decision makes clear that the laundering of bedclothes or of clothes, soiled by incontinence but taken away for laundering out of the presence of an applicant unable to do it for him or herself, cannot qualify as attention under s.64, and hence (by analogy) under s.72, it equally recognises that certain acts of attendance performed by way of immediate and essential 'cleaning-up' after an incident of incontinence may qualify as such attendance. Within the constraints of the requirement that such cleaning-up should take place in the presence or the vicinity of the applicant, I consider that steps taken for the *immediate* removal of soiling from clothes,

> bed linen or adjacent surfaces are apt to qualify under this head. In a case of faecal incontinence which results in the soiling of clothes, towels or bed linen, or the dropping or smearing of faeces on carpets or furniture, it is at the very least in the interests of hygiene that such occurrences be rectified immediately as part and parcel of the cleaning-up operation necessary following the incident of incontinence giving rise to such soiling. If that is done, then, even if the operation concerned is one of thorough washing rather than merely 'rinsing', the criteria of immediacy and intimacy are sufficiently satisfied and the time spent in cleaning-up should be taken into account when assessing whether or not the attention given amounts to a significant portion of the day.

26. Admittedly, *Ramsden* was a case of faecal incontinence rather than urinary incontinence, but the same principle applies here.

27. I therefore conclude that the First-tier Tribunal erred in law for the reason summarised above. I accordingly allow the Appellant's appeal to the Upper Tribunal. I also set aside (or cancel) the First-tier Tribunal's decision.

The disposal of the underlying appeal

28. The question then is whether I should remit (or send back) the case for re-hearing to a fresh tribunal or decide the underlying appeal myself. In my view I do not need to remit the original appeal for re-hearing by a new tribunal. This case concerns an original decision on a renewal claim which is now more than three years old. I am satisfied there is sufficient evidence on file for me to re-make and substitute the decision under appeal, as the Secretary of State's representative invites me to do. The reliability of the evidence of the Appointee is not in any doubt. I also recognise that K's father has requested an oral hearing of the Upper Tribunal appeal "as I would like to speak if any issues arise regarding the decision". However, arranging an Upper Tribunal oral hearing will result in yet further delay. There is no real prejudice to the Appellant in proceeding to decide the underlying appeal on the papers. It is therefore fair and just and in accordance with the overriding objective to proceed in that way.

29. The question then is what type of award of DLA to make. Mr Decker for the Secretary of State simply invites me to "award the care component of DLA for night needs only". I agree. K has never had an award of the DLA mobility component and there is no suggestion on the evidence that she meets the criteria for an award at either rate of the DLA mobility component. K's father also concedes that K no longer meets the day-time condition for the DLA care component (see paragraph 5 of Judge Ward's grant of permission above). The evidence on file from the school certainly indicates that K manages her conditions by herself when at school during the day. That being so, the only appropriate award of DLA is the middle rate of the DLA care component on the basis of K's night needs.

30. Given the Secretary of State's concession, and the compelling evidence of K's father, I am satisfied that K reasonably requires at night "from another person prolonged or repeated attention in connection with [her] bodily functions" within the meaning of section 72(1)(c)(i) of the Social Security Contributions and Benefits Act (SSCBA) 1992. I am furthermore satisfied that K "has requirements of a description mentioned in the condition substantially in excess of the normal

requirements of persons of [her] age" within the meaning of section 72(1A)(b)(i) of SSCBA 1992.

31. The remaining question is the length of the award of the DLA care component. I note that K's previous awards were for a period of either one or two years, as is conventional for children with conditions where the effects of the disability in question may change. I also bear in mind that a young person with an award of DLA will be invited to claim PIP instead of DLA as they approach their 16th birthday (which for K would be in 2024, assuming she is still entitled to DLA at that stage): see regulation 3(3) of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387). In addition, I need to make my best guesstimate of an appropriate length of an award of the DLA care component looking at the circumstances as they were at the time of the original decision in April 2019. Weighing all considerations as fairly as I can, I consider that a two-year award would be appropriate.

32. I therefore re-make the decision originally under appeal in the following terms:

> *The Appellant's appeal (SC236/19/00932) to the First-tier Tribunal is allowed. The Respondent's decision of 18 April 2019 is revised.*
>
> *The Appellant is entitled to the middle rate of the DLA care component for the period from 23 April 2019 to 22 April 2021 as she meets the night-time attention condition. The Appellant is not entitled to either rate of the DLA mobility component for the period from 23 April 2019.*

33. It follows that the Appellant is due a payment of arrears of DLA covering the two-year period from 23 April 2019 to 22 April 2021. She will also need to be invited by the Department to make a belated renewal claim for DLA for the period from 23 April 2021. That further renewal claim will need to be judged on the basis of the material facts as they then present themselves.

34. Finally, I formally find that the First-tier Tribunal's decision involves an error of law on the grounds as outlined above.

Conclusion

35. I therefore 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 decision is re-made as above (section 12(2)(b)(ii)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Signed on the original on 15 November 2022