**IN THE UPPER TRIBUNAL** **Upper Tribunal case No.** CPIP/2329/2015
**ADMINISTRATIVE APPEALS CHAMBER**

**Before:** Mr E Mitchell, Judge of the Upper Tribunal

**Decision:** The decision of the First-tier Tribunal (11th February 2015, Haverfordwest, file reference SC 195/14/00347) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is **REMITTED** to the First-tier Tribunal for rehearing. Directions for the rehearing are at the end of this decision.

**REASONS FOR DECISION**

1. In granting Mr M permission to appeal against the First-tier Tribunal's decision, given following a hearing which Mr M attended and gave oral evidence, I made the following observations:

> "I have given permission because there is a realistic prospect of the Upper Tribunal being persuaded that the First-tier Tribunal ("the Tribunal") made a material error of law.
>
> An apparently unusual feature of this case is that some six months elapsed between Mr M requesting a reconsideration of the decision to refuse him P.I.P and the reconsideration decision. In total, ten months elapsed between Mr M's initial refusal decision and the tribunal hearing.
>
> I note the significant and potent mental health medication prescribed to Mr M, including Quetiapine (an anti-psychotic). I also note Mr M's evidence that his condition had deteriorated. I also note that Mr M's GP was under the impression that the Tribunal was apparently solely concerned with his mobility (see the letter of 11 February 2015).
>
> The relevant date in this appeal was 30th April 2014. Mr M's disabilities had to be evaluated as they stood on that date. Arguably, his ability to present his case to the Tribunal – including his ability to identify his pre-deterioration disability levels - was inhibited by a combination of delay and the effects of his mental health condition and medication. The delay was apparently due to the actions of one party to the appeal. Did this give the DWP an unfair advantage that the Tribunal ought to have tackled? For example, by obtaining reliable evidence of Mr M's condition in April 2014 which may well have been found in his G.P. records. Was there an equality of arms between the parties? I grant permission to appeal on the ground that arguably the DWP had an

> unfair advantage before the First-tier Tribunal and the Tribunal should have taken steps to remedy this".

2. In response, the Secretary of State's representative informs me that he supports the appeal. He does so on the ground that the Tribunal should have of its own initiative considered whether to adjourn to give Mr M the opportunity to seek representation. The representative adds "it may have been useful to obtain reliable medical evidence pertaining to the date of the decision which may have been found in his GP records".

3. The parties were directed to inform the Upper Tribunal if they thought it ought to hold a hearing before deciding the appeal. Mr M wrote that he wanted an appeal hearing unless the Upper Tribunal allowed his appeal on the papers. The Secretary of State did not request a hearing.

4. I decide that the First-tier Tribunal's decision involved an error on a point of law.

5. Section 6(1) of the Human Rights Act 1998 required the First-tier Tribunal to act compatibly with Mr M's convention rights (his rights under the provisions of the European Convention on Human Rights scheduled to the 1998 Act). Rights to social security benefits are "civil rights" for the purposes of Article 6(1) of the Convention (see, for example, *Schuler-Zgraggen v Switzerland* (1993) 16 E.H.R.R. 405)). The Tribunal's task was to determine whether Mr M had a right to a social security benefit and so it was required to do so compatibly with Article 6(1). Article 6(1) has an 'equality of arms' aspect, correctly described as follows, in my view, in the current edition of *Human Rights Practice* (Simon & Emmerson, published by Sweet & Maxwell):

> "the principle of "equality of arms" involves striking a "fair balance" between the parties, in order that each party has a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."

6. In combination, certain features of this case raised a real issue as to whether the Tribunal, were it to proceed to determine Mr M's appeal in the circumstances as they stood on 11th February 2015, would be acting in accordance with the 'equality of arms' principle. These features were:

- Mr M's apparently significant difficulties in mental functioning as suggested by his medication, including medication for treating psychosis (thought disorder), and the contents of his claim form which referred to his difficulties in "thinking straight" due to his mental condition;
- On Mr M's case he had deteriorated since the decision under appeal (the relevant date for entitlement purposes) so that evidence of his functioning at the date of the hearing would not necessarily assist his case;
- The difficulties likely to be faced by an individual with a thought disorder in giving reliable evidence about his mental functioning at a time when he was in better mental health;

- The medical evidence relied on by Mr M in support of his case only related to joint problems, not his mental health;
- The other party had delayed initiating the appeal proceedings for six months so that it may thereby have improved its chances of success while reducing Mr M's.

7. In the circumstances just described, the Tribunal was required to turn its mind to whether Mr M had had a reasonable opportunity to present his case and, if he had not, what needed to be done to afford him that opportunity. There were a number of possible options, including those described in my observations when granting permission to appeal and in the Secretary of State's response. It is not for me to prescribe how the First-tier Tribunal should have responded but I am satisfied that, given the unusual features of this case, the Tribunal needed to ask itself whether Mr M had had a reasonable or fair opportunity to put his case. The material before suggests it did not do so and that was an error of law. It cannot be described as immaterial because the Tribunal made no clear findings as to the nature, severity and functional effects of Mr M's mental health at the date of the decision under appeal. I set aside the Tribunal's decision and remit to a differently-constituted panel of the First-tier Tribunal for re-hearing.

**Directions**

**Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, I direct as follows:**

(1) Mr M's appeal is remitted to the First-tier Tribunal for it to reconsider, following a re-hearing, Mr M's appeal against the Secretary of State's decision of 30th April 2014. The membership of this Tribunal must not include anyone who was a member of the Tribunal whose decision I have set aside.

(2) The First-tier Tribunal that reconsiders Mr P's appeal must not take into account, in its reasoning, the decision or findings of fact of the Tribunal panel whose decision I have set aside.

(3) Mr M is reminded that the law prevents the First-tier Tribunal from taking into account circumstances not obtaining at 30th April 2014, when the decision under appeal was taken.

(4) If Mr P has any further documentary evidence or argument that he wishes to put before the First-tier Tribunal, it must be sent to the First-tier Tribunal's office within one month of the date of this decision. At one point during the Upper Tribunal proceedings, Mr M was represented by the Pembrokeshire Care Society. I strongly recommend that he seeks their assistance for his remitted appeal to the First-tier Tribunal.

**(Signed on the Original)**

E Mitchell
**Judge of the Upper Tribunal**
**14th January 2016**