CE/976/2015

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

DECISION

This appeal by the claimant succeeds. Permission to appeal having been granted by me on **5 May 2015**, in accordance with the provisions of section 12(2) (a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside that part of the decision of the First-tier Tribunal sitting at **Wolverhampton** and made on **1 November 2013** under reference **SC053/13/00460** which relates to the potential applicability of any schedule 3 descriptor or regulation 35 (2**)**. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal **for a hearing and decision on the issues relating to schedule 3 or regulation 35 (2) in accordance with the directions given below.**

DIRECTIONS

1. The listing directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions; however the limitation on the issues before the panel is part of my decision in the case.

2. The case will be an oral hearing listed before a differently constituted panel. However I limit the considerations of the panel to matters concerning the applicability or otherwise of schedule 3 or regulation 35 (2) Employment and Support Allowance Regulations 2008. I consider that at this stage, given the lapse of time from the decision under appeal and the implicit acceptance by the Secretary of State of the application of regulation 29 (2) (b) of the same regulations, it would be unfair to the appellant to revisit the decision ab initio (from the outset); the FTT will proceed on the basis that the appellant has limited capability for work, the issue for the fresh tribunal being whether by means of entry into schedule 3 or by the application of regulation 35, he may additionally have limited capability for work-related activities.

3. The Secretary of State shall send to the HMCTS regional office as soon as possible and in any event within 4 weeks information as to the range of work related activities available in the appellant's area at the relevant time, and therefore activities in which the appellant may have been required to participate. This is in accordance with the views of the 3 judge panel in the case of *IM* [*2014] UKUT 412 (AAC).*

4. The appellant shall send to the HMCTS regional office as soon as possible any further relevant written medical or other evidence, if there is any. If he cannot send that evidence within 4 weeks of the issue of this decision he will need to contact that office to let them know that further evidence is expected. That is not to say that any further medical or other evidence will be necessary.

5. **The appellant must understand that the new tribunal will be looking at his health problems and how they affected his daily activities at the time that the decision under appeal was made, 19 October 2012. Any further evidence, to be relevant, should shed light on the position at that time.**

6. **The above timetable should not prevent this case being listed within the normal timeframe for a rehearing from the Upper Tribunal, subject to any further directions from a District Tribunal Judge.**

7. The new panel will make its own findings and decision on all relevant descriptors, considering all aspects of the case afresh. Note should be taken of the fact that the descriptors applicable at the date of decision should be used, and not those which came into force in January 2013.

8. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course.

9. **The clerk to the First-tier tribunal should send to the presiding Judge of the original panel a copy of this decision.**

REASONS

The background

1. This matter concerned an award of Employment and Support Allowance to the appellant following his conversion from income support based upon incapacity. The decision was made on 19 October 2012 that he did not have limited capability for work and her award was terminated.
2. That decision was made following the appellant having completed a form ESA 50, and a healthcare professional, Nurse Baldwin having examined him on 24 September 2012.
3. An appeal to the FTT followed, which was heard almost exactly a year after the decision under appeal.

The appeal before the FTT

4. The FTT heard what was described on the face of the decision notice issued following the hearing ‘cogent oral evidence in relation to physical factors’, I surmise that this evidence was from the appellant.

There is no record of proceedings on the file. The tribunal found that he did have limited capability for work, the provisions of regulation 29 Employment and Support Allowance Regulations 2008 applying, but he did not have limited capability for work related activities, neither any schedule 3 descriptor nor regulation 35 (2) being applicable to him.

5. I cannot say why the FTT came to the view that they did in relation to schedule 3 or regulation 35 as there was no statement of reasons for the decision of the tribunal. This is a matter which I will return to below.

The appeal to the Upper Tribunal

6. This followed a series of procedural steps in the FTT, because the application for permission to appeal had been made out of time.
7. The Upper Tribunal received an application for permission to appeal, but it was apparently without either a statement of reasons or a decision as to permission to appeal from the first-tier Tribunal. The upper tribunal contacted the FTT directly in November 2014. The request concerned those matters as well as a general request for the file.
8. A letter was sent to the Upper Tribunal by a clerk to the FTT, dated 8 December 2014. The material parts of the letter said

"I wish to confirm that we did receive Permission to Appeal to the Upper Tribunal from the appellant, which was treated as a request a statement of reasons. The judge directed that the Statement of Reasons request was late, and so a Statement has not been produced. . Please see the attached letter addressed to the appellant dated 14 February 2014 which explains that the statement request was made, and has been refused."

9. The FTT file and computer records show that following that letter, on 10 February 2015, an interlocutory referral was sent to the District Tribunal Judge. It was a short document, apparently without any accompanying letter from the appellant, entitled Permission to Appeal Request. It stated that the Statement of Reasons request had previously been refused. The following day the judge made a decision refusing the application for permission to appeal. It said

"The appellant has lodged an application for permission to appeal to the Upper Tribunal against a decision of the Tribunal issued on 1/11/2013. An earlier application for a Statement of Reasons have been refused and out of time. I refuse to admit the application for permission to appeal is valid. In particular, I am not satisfied that it is in the interests of justice to apply paragraph (7) (b) of Rule 38 of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008."

10. I granted permission to appeal under rule 21(7) Tribunal Procedure (Upper Tribunal) Rules 2008, it being just for me to do so. I accepted the appellant's reasons for making a late application below, because they seemed to me to be wholly plausible. He said that having won his appeal he had no reason to ask for a statement of reasons or to appeal, but in mid-January 2014 he was told that he had to present

himself at the job centre for what he described as a work related interview, for reasons which he did not understand, given what he understood as the result of his appeal, and which he felt unable to do. This prompted him to seek further information about the appeal decision.

11. As I explained in my grant of permission to appeal he wrote to HMCTS on 16 January 2014 requesting a "reconsideration". Although outside the one-month time limit for requesting a full statement as of right, bearing in mind his confusion having been told in the decision notice that his appeal had been allowed, there was a reason for lateness and the time lapse was not great. He wrote two subsequent letters dated 7 February 2014 and 9 October 2014 which were clear attempts to pursue the matter. Neither letter gives any indication that he had received a judicial decision during that period.
12. There is no written judicial determination in the bundle between the ESA appeal decision notice and the refusal of permission to appeal in February 2015, that is to say after the appellant had approached the Upper Tribunal. Nor is there any on the backing file. There are, however, two letters from administrative staff to the appellant.
13. The first is dated 14 February 2014. That is likely to have been in answer to one of the letters dated 16 January 2014 and 73 2014. It is the letter referred to in the letter to the Upper Tribunal of 8 December 2014. It refers to the request for a statement of reasons which was received after the one month time limit, saying *"I referred the request to the tribunal judge and the request was refused".*

My concerns

14. I wondered whether the contents of that letter constituted the judicial decision referred to by the District Tribunal Judge, and if so, was that an effective judicial decision?
15. A similar point arose in relation to a further letter dated 16 October 2014 (probably written in response to the letter dated 9 of October 2014) which enclosed a copy of the previous letter, and which reiterates *"unfortunately your request a statement of reasons was refused by a district tribunal judge as the date that the statement was requested was more than one month since the date of the hearing".*
16. I was of the view that this matter deserved consideration.
17. In any event even without the procedural difficulties post hearing, the papers suggested that the FTT had not had the benefit of information from the Secretary of State as to any work related activity that the appellant might have been expected to perform. Any regulation 35 considerations in which the FTT had engaged thus potentially fell foul of the position made clear, albeit subsequent to the FTT decision in this case, by the decision of the three-judge panel in the case of *IM-v-SSWP [2014] UKUT 412 (AAC).*

The position of the Secretary of State

18. Following my grant of permission to appeal the Secretary of State has filed a response agreeing with the point that I made as to the substantive regulation 35 issue, and agreeing to a decision without

reasons. The appellant is also content with the acknowledgement that he has won his appeal without reasons.

19. The Secretary of State, however, despite the assistance of the submission in other areas, did not deal with the particular procedural point which I had raised in my grant of permission to appeal. Whilst it is not necessary in view of the concessions for me to elaborate in relation to the substantive regulation 35 issue, I will address it shortly, and then go want to deal with what I consider to be a procedural issue of some importance.

Regulation 35 (2) Employment and Support Allowance Regulations 2008

20. The provisions of regulation 35 (2) read as follows

35(2)
A claimant who does not have limited capability for work related activity as determined in accordance with regulation 34 (1) is to be treated as having limited capability for work related activity if-
(a) the claimant suffers from some specific disease or bodily or mentally disablement; and
(b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant was found not to have limited capability for work related activity.

21. It is settled law that the risk to health referred to in subparagraph (b) includes the health of the claimant.
22. Following the case of *IM* the Secretary of State has a duty to supply the FTT with information as to the range of work related activities which were available in the area in which the appellant lives at the relevant time, those being the activities with which he might have been required to engage.
23. The assessment of risk is a factual matter for the FTT dealing with the case. The information from the Secretary of State pursuant to the decision in *IM* and my directions should provide the tribunal with information as to the more demanding work related activities which may be required of the appellant. The FTT need to consider those together with the appellant's personal factors and decide whether a finding that the appellant was not incapable of Work Related Activities would cause substantial risk to the mental or physical health of any person as regulation 35 (2) (b) requires. It may be, of course, that there is no risk to health at all, or if there is a risk it is not substantial within the *IM* sense of a risk that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case [65] et seq and [110]. That will be a matter for the FTT to decide and explain in the light of the appellant's condition and the likely expectations of him.
24. If the '*IM* information' is not forthcoming the FTT should bear in mind the following paragraphs of that case:

114. For the reasons we have given, we consider that, if the First-tier Tribunal were able to be confident that concerns it had about the risk to a person's health if the claimant were required to engage in certain forms of work-related activity would be transmitted to a provider, it might be less inclined to find that there would be a substantial risk to the mental or physical health of any person if it were to find the claimant not to have limited capability for work-related activity.

115. However, in our view, where the present practice of the Secretary of State has the effect that the relevant predictions cannot be made with sufficient certainty, the underlying purpose of regulation 35(2) is best served and promoted by a finding that regulation 35(2) applies rather than by leaving the vulnerable claimant to take the risk of a decision that causes the regulation 35(2) risk to materialise or would do so if not successfully challenged.

116. A finding that there is some work-related activity in which a claimant could engage without a substantial risk to someone's health is not by itself a sufficient ground for finding that there would not be risk to someone's health if the claimant were found not to have limited capability for work-related activity. That is because it does not wholly answer the statutory question.

25. Additionally the fresh tribunal may be assisted by some comments of Upper Tribunal Judge Rowland who was a member of the three-judge panel in *IM*, and has more recently elaborated on the difficulty that it dealt with in *CE/4053/2013* saying

'The difficulty highlighted in IM is that, because the results of work capability assessments are not routinely passed to providers who determine what work-related activity a claimant should be required to do, there may a risk of a provider requiring a person with, say, mental health problems to perform unsuitable work-related activity, due to the provider's ignorance of those problems or their extent.

The procedural issue

26. The matter remains as to whether the matters raised in the appellant's correspondence of early 2014 were the subject of valid judicial decision-making.
27. This is a technicality at this stage, since the substantive issue has been decided. Accordingly my remarks are obiter dicta, nonetheless I offer them as guidance for the FTT, a function of the Upper Tribunal being to give guidance on matters of procedure as well as substantial law in addition to the development of the law on a given issue incrementally by virtue of the decisions made.
28. The issue seems to me to be whether a judicial decision can be effectively communicated to a litigant by being summarised in a letter from administrative staff, or whether such a decision requires the judge to endorse or sign an order or direction.
29. It is trite law to say that justice must not only be done, but must be seen to be done.

30. There is nothing in the papers that I have examined which indicates to me that the response to this appellant was judicially authorised; it seems to me more likely to have been an administrative response which was thought to be an effective shortcut to sending out the various decisions of a judge or judges, which may not necessarily have been drafted in typed form by the judge, it being acceptable practice for a judge to endorse a paper accompanying the application with their decision and their signature. I would however, expect in those circumstances that the decision would be typed up as an order bearing the name of the judge, albeit perhaps by a member of administrative staff, and sent to the litigant signed or otherwise approved by the judge making the order. A mere summary of a decision without telling the litigant when the decision was made or the name of the judge making it is not consistent with an open and transparent decision-making process. Such an opaque procedure is not in accordance with natural justice.
31. In the civil courts their procedural rules deal specifically with the duty of the judge to sign a determination. Whilst those rules cannot be imported wholesale into other jurisdictions, it seems to me as well when natural justice considerations are at the core of a rule not to ignore the fact that the civil courts have thought it appropriate to embody the concept. The mere fact that the tribunal rules do not specifically advert to the point does not mean that it does not apply in a tribunal context; there has been criticism in respect of judicial directions in a case where a refusal to lift an order made barring a respondent from further participation in an appeal, having initially been communicated by telephone by a member of administrative staff, was followed up with a letter encapsulating the decision signed not by, but on behalf of the judge making the decision *(London Borough of Camden-v- FG (SEN) [2010] 249 (AAC).* In that case His Honour Judge Pearl sitting as a judge of the Upper Tribunal said that such a decision should be in the form of an order signed by the judge. That appears to me to be applicable to all judicial directions save in urgent circumstances when an order might be drawn up subsequent to an oral communication. In any case where a judge refuses an application either on procedural or substantive grounds the applicant must know that the matter has been judicially considered, the name of the person who has considered it, and, albeit briefly, why the decision was made.

In conclusion

32. In the light of all the matters above I direct that the fresh FTT considers the possible applicability of regulation 35 (2) if no descriptor in schedule 3 applies.
33. I remind the appellant that success in the Upper Tribunal is no guarantee of success at the re-hearing.

Paula Gray
Judge of the Upper Tribunal

Signed on the original on 25 January 2016