DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Barnsley First-tier Tribunal dated 21 October 2015 under file reference SC001/15/00483 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 22 June 2015 is remitted (or sent back) to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve either the tribunal judge or medical member who was previously involved in considering this appeal on 21 October 2015.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as they were up to and as at the date of the original decision by the Secretary of State under appeal (namely 22 June 2015).

(4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Leeds within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at or before the date of the original decision of the Secretary of State under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

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

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

1. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal involves an error on a point of law. For that reason I set aside the tribunal's decision. The Secretary of State's representative is in agreement on that course of action, but I give brief reasons for the benefit of the First-tier Tribunal.

2. The case now needs to be reheard by a new First-tier Tribunal (FTT). I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new FTT in Barnsley will succeed *on the facts*.

3. So the new tribunal may reach the same, or a different, decision to that of the previous tribunal. It all depends on the findings of fact that the new tribunal makes.

The background to this appeal to the Upper Tribunal

4. On 22 June 2015 the Secretary of State's decision-maker made a decision that the Appellant qualified for employment and support allowance (ESA), scoring 18 points in total for descriptors 15(b) and 16(b). However, it was also decided that the Appellant did not qualify for the support group. On 21 October 2015 the FTT dismissed the Appellant's appeal, deciding that no Schedule 3 descriptor applied and nor did the special provision for exceptional circumstances in regulation 35 apply. A District Tribunal Judge refused to review the decision and also refused permission to appeal. The Appellant then appealed to the Upper Tribunal with the help of Howells Solicitors, who set out six grounds of appeal.

The proceedings before the Upper Tribunal

5. Judge Mitchell subsequently gave permission to appeal in these terms:

> "3. I grant permission to appeal because, arguably, the Tribunal's conclusion that regulation 35 of the ESA Regulations did not apply was not supported by adequate findings of fact. The Tribunal finds that Mr K would be able to participate in various forms of work-related activity, such as attending a basic skills course, but does not address the potential consequences of such activity for Mr K's mental health. Arguably, in the light of the evidence the Tribunal should have addressed the potential consequences for Mr K's mental health of repeated exposure to what may be for Mr K anxiety-inducing activities.
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> 4. I also grant permission to appeal on certain of the grounds relied on by Mr K's representative. Arguably, the Tribunal gave inadequate reasons for doubting Mr K's credibility because he cared for his father when it made no findings about the extent to which that care brought Mr K into contact with anxiety-inducing situations or activities.
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> 5. I do not grant permission to appeal on the ground that the Tribunal should have investigated why Mr K was refused DLA. I do not understand this ground because the papers indicate that he was in receipt of an award of DLA.
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> 6. The argument that the Tribunal should have investigated the ongoing mental effects of an attack on Mr K does not add anything of substance to the grounds on which I have already granted permission to appeal. The more general issue, reflected in those grounds, is whether the Tribunal adequately calibrated the nature and severity of Mr K's anxiety disorder in deciding he could participate in

> work-related activity without that involving a substantial risk to his health. Similarly, the criticisms made of the tribunal's absence of fact-finding concerning the daily walk to the shops does not add anything to the main grounds on which permission to appeal has been granted.
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> 7. The argument that the Tribunal made inadequate findings of fact about visual impairment does not have a realistic prospect of success. The key issue was the effect of work-related activity on Mr K's mental health and I do not think the evidence would have supported a finding that Mr K's visual impairment would have generated a substantial risk to his health if he was required to do work-related activity.
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> 8. I am also a little uneasy (I put it no higher than that at this stage and acknowledge I do not know why the hearing time was changed) that the Tribunal, knowing an appellant had a documented history of anxiety, decided to alter the previously notified time for his hearing and, moreover, rely on the evidence generated by that timing change in dismissing the appeal. Was this consistent with the Tribunal's overriding objective of dealing with cases fairly and justly? I also grant permission to appeal on that ground."

6. Mr Mick Hampton for the Secretary of State has indicated that he broadly supports the appeal on the grounds identified by Judge Mitchell (paragraph 8 of the ruling aside) and is content that the matter is remitted (or sent back) for re-hearing to a new tribunal. In particular, Mr Hampton points to the apparent contradiction between two of the FTT's findings. The first was its acceptance that descriptors 15(b) and 16(b) applied. The second was its inconsistent finding at para [26] of the statement of reasons that the Appellant's anxiety "is not so severe to prevent him from functioning normally".

7. I formally find that the FTT's decision involves an error of law on the grounds as outlined above in paragraphs 3 and 4 of Judge Mitchell's grant of permission to appeal and as agreed with by Mr Hampton.

8. In those circumstances I do not need to resolve fully the point raised by Judge Mitchell in paragraph 8 of his ruling giving permission to appeal. This related to the FTT's decision (apparently made on the day) to re-arrange the time of the Appellant's hearing from 4 pm to 2 pm. It is unclear from the file why this was done and it is futile to try and explore that issue now, as memories will have long since faded. One possible (and indeed the most likely) explanation is that another case (or possibly more than one case) fell out of the afternoon list, so the FTT clerk telephoned the Appellant in the morning to see if he was available to attend for the earlier 2 pm slot. The FTT recorded in its statement of reasons that the Appellant had coped with the change and had rearranged the time of a pre-booked taxi.

9. I share Judge Mitchell's lurking sense of unease but in the absence of a clear picture of the relevant circumstances it is difficult to be prescriptive. The starting point is that any alteration to the listing arrangements on the day is a case management decision for the Tribunal judge. As such, the judge has a fairly broad discretion. However, that discretion must always be guided by the overriding objective of dealing with cases fairly and justly. This was a case where the Appellant had stated on his ESA questionnaire that he could not cope with changes to his routine. His GP had advised that he "is suffering with significant stress related symptoms … [and] had a constant feeling of anxiety and rarely leaves the house". On the face of it, this case would hardly seem (putting it mildly) to be an ideal candidate for a late adjustment of the hearing time notified on the very day of the hearing.

10. There are a number of other reasons why considerable caution may need to be exercised about moving an appeal listed hearing time on the day. Just because an appellant lives relatively near to the venue does not mean s/he does not have other commitments. The hearing time may have been scheduled by the regional listing team following consultation with the appellant for a given time for a particular reason which may not be immediately evident from the file. There is a clear risk that a revised starting time on the day may put the appellant at some inconvenience but he or she may still feel obliged to agree to a new start time for the hearing, not wishing to upset the panel. Much may depend on how the clerk put any such request to the appellant. There is a world of difference between a clerk telephoning and saying "The Tribunal can now see you at 2 pm today, are you free to come along early?" and saying "Your hearing is fixed at 4 pm. If it is convenient to you, but only if it is, in fact the Tribunal could hear your appeal at 2 pm today. Please do not feel obliged to change the time; the Tribunal will of course see you as agreed at 4 pm if that is better for you."

11. There may, of course, be some cases where an appellant is genuinely only too happy to agree to an earlier hearing slot on the day. It may reduce (rather than heighten) their sense of anxiety. It may fit in better with their domestic commitments, e.g. the school run. But tribunals should be very wary of making assumptions in this regard. As a starting point, tribunals would be well advised to start from the position that there should be a good reason to change a previously notified hearing start time. A last minute change in the listing arrangements – which, in the context of an appeal that may have been pending several months, a change on the day amounts to – is likely to add to (rather than detract from) an individual's general sense of anxiety about the hearing. The convenience of the tribunal panel members can hardly be regarded as a pressing reason in terms of the overriding objective.

12. There is an added reason for concern in the present case. The FTT's record of proceedings notes that at the outset of the hearing the Appellant was "very shaky". The statement of reasons states that he then settled down (para 6) and communicated well during the hearing (para 15d). This ability to adapt was then cited as an example of an inconsistency in his evidence (para 16) and a reason why regulation 35 did not apply (para 26). Leaving aside any wider issues of fairness, there is an obvious risk that the FTT overlooked section 12(8)(b) of the Social Security Act 1998, namely the bar on taking into account circumstances not obtaining as at the date of the original decision.

13. As indicated, I do not need to resolve the point here given the appeal can be allowed on other grounds.

14. Having set aside the FTT's decision, I then need to decide whether to re-decide the underlying appeal myself or send the case back for a re-hearing. In earlier Directions Judge Mitchell had doubted that he "would object if the Secretary of State (in the event that he supported the appeal) invited me to replace the First-tier Tribunal's decision with a decision that Mr K is entitled to ESA with the support component". The Appellant's representative duly asks the Upper Tribunal to re-decide the original appeal as well as setting aside the FTT's decision. She points out that the Appellant has mental health problems and the anxiety of waiting for another hearing will exacerbate these problems. Mr Hampton, however, does not make the invitation to avoid remittal. He notes that any work-related activity required of the Appellant would be provided under the Jobcentre Plus (JCP) Offer, and would not involve work placements or work experience but less demanding types of activity. He

suggests that the Appellant would be able to manage those tasks without a substantial risk to health.

15. I have some sympathy with the points being made by the Appellant's representative. However, on balance I am not satisfied that there is sufficient material on file to re-decide the matter myself. Further findings of fact are needed as to whether there would be a substantial risk to the Appellant's mental health if he were found not to have limited capability for work-related activity within regulation 35(2). The new FTT may also be able to take into account the Upper Tribunal's forthcoming guidance on the application of regulation 35(2) in the cases under file references CE/4887/2014 and CE/1910/2015.

What happens next: the new First-tier Tribunal

16. There will accordingly need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant qualified for the ESA support group. That is a matter for the good judgement of the new tribunal. That new tribunal must review all the available relevant evidence and make its own findings of fact.

17. In doing so, the new FTT will have to focus on the Appellant's circumstances as they were as long ago as June 2015, and not the position as at the date of the new FTT hearing, which will obviously be at least 18 months later. This is because the new FTT must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The decision by the Secretary of State which was appealed against to the FTT was taken on 22 June 2015.

Conclusion

18. I conclude that the decision of the First-tier Tribunal dated 21 October 2015 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 case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 18 October 2016

Nicholas Wikeley
Judge of the Upper Tribunal