# [2016] AACR 31

## (LO'L v Secretary of State for Work and Pensions (ESA) [2016] UKUT 10 (AAC))

**Judge Jacobs**
**CE/85/2014**
**6 January 2016**

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## Tribunal procedure and practice – fair hearing – tribunal not subject to the duty to make reasonable adjustments under the Equality Act 2010

The claimant suffered from, amongst other things, depression, anxiety and panic attacks and was in receipt of employment and support allowance (ESA). Following her completion of a questionnaire and examination by an approved health care professional the Secretary of State decided, on supersession, that she no longer had limited capability for work and was therefore was not entitled to ESA. She appealed to the First-tier Tribunal (F-tT) on the basis that her circumstances were unchanged and stated that she was unable to attend a hearing because of her mental health problems or to afford medical evidence. The F-tT decided to proceed without a hearing and, after considering all the available documentary evidence, provided a detailed explanation for its decision to dismiss the appeal. The claimant appealed to the Upper Tribunal (UT) and among the issues before it was: what account should be taken by a tribunal of a claimant's mental health problems when deciding whether to hold or to proceed with a hearing, and whether there had been a breach of the claimant's rights under the Equality Act 2010, to natural justice or under the European Convention on Human Rights (ECHR).

*Held,* disallowing the appeal, that:

1. a duty to make reasonable adjustments under section 29 of the Equality Act 2010 did not apply as the F-tT was exercising a judicial function: paragraph 3(1) (a) and (b) and (2) of Schedule 3 to the Act. The decision in *DC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 218 (AAC) was wrong in so far as it relied on the existence of such a duty and should not be followed. The decisions in *R (MM and DM) v Secretary of State for Work and Pensions* [2013] UKUT 259 (AAC); [2013] EWCA Civ 1565 and [2015] UKUT 107 (AAC); [2016] AACR 11 contained valuable evidence of the sort of problems that persons with mental health problems may encounter but each case must be decided on its own facts and circumstances (paragraphs 9 to 11);

2. a claimant's mental health problems must be taken into account when applying the overriding objective set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, which included dealing with a case fairly and justly, and ensuring, as far as practicable, that the parties were able to participate fully in the proceedings. Rules 27(1)(b) (the power to decide an appeal without an oral hearing) and 31(b) (the power to proceed with a hearing in the absence of a party if it is in the interests of justice) had to be applied in the light of the overriding objective in rule 2. The same approach applied where a tribunal was considering whether to proceed with a hearing in the claimant's absence. It was impossible to apply the correct approach without first establishing the nature of the claimant's mental health problems. The requirements of natural justice and the right to a fair hearing under Article 6 of the ECHR were additional to the tribunal procedure rules and, in contrast to the Rules, their application was not a matter of judgment, but a test of fairness: *Terluk v Berezovsky* [2010] EWCA Civ 1345 (paragraphs 15 to 18);

3. there was no error of law by the F-tT; its reasons for not holding a hearing were soundly based in the evidence and circumstances of the case, it identified all the relevant considerations and devoted a proportionate amount of time to analysing whether to hold a hearing. The claimant was dealt with fairly and the proportionality of the tribunal's time and analysis fed into that test: *Terluk*. A telephone hearing was one possibility that might have been considered, but given all the information before the tribunal it had not been necessary in order to deal with the issue fairly (paragraphs 22 to 36);

4. there was no breach of the Secretary of State's duty to disclose further relevant evidence because he did not have any such evidence (paragraph 38);

5. the F-tT was not at fault for proceeding on the available evidence rather than using its power to obtain more (paragraphs 40 to 43).

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**DECISION OF THE UPPER TRIBUNAL**
**(ADMINISTRATIVE APPEALS CHAMBER)**

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC242/13/09103, made on 22 July 2013 at Ashford, did not involve the making of an error on a point of law.

**REASONS FOR DECISION**

## A. The issue

1. How should the First-tier Tribunal take account of a claimant's mental health problems when deciding whether to hold a hearing? I have decided that:

- the tribunal is not under a duty to make reasonable adjustments under the Equality Act 2010,
- but it is under a duty to take those problems into account in exercising its powers under its rules of procedure, and in particular in applying the overriding objective,
- as well as in order to avoid a breach of natural justice or the claimant's Convention right to a fair hearing.

The same approach applies if the tribunal is considering whether to proceed with a hearing in the claimant's absence.

## B. The Secretary of State's decision

2. The claimant had been entitled to income support on the basis of incapacity from 1994. She was awarded an employment and support allowance from and including 29 October 2011 on the basis that she had anxiety, diabetes and musculoskeletal problems. It seems that this award was made by the First-tier Tribunal on appeal, but no documents are available. Her capability for work was next assessed in late 2012 and early 2013. She submitted a questionnaire, identifying the difficulties she had with the activities relevant to the assessment. Her comments refer to pain, discomfort, tiredness, anxiety and panic attacks. She was then interviewed and examined by a health care professional who found no relevant disabilities. On the basis of the evidence available, the decision-maker decided that the claimant scored six points for Activity 15(c) (getting about) in Schedule 2 to the Employment and Support Allowance Regulations 2008 (SI 2008/794). As her score did not reach the threshold of 15 points, she no longer had limited capability for work. Her award was terminated on and from 21 February 2013.

## C. The First-tier Tribunal's rules of procedure

3. It is convenient at this stage to set out the relevant provisions of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685):

> "**Citation, commencement, application and interpretation**
>
> **1. – …**
>
> (3) In these Rules **–**
>
> …

'hearing' means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication; …

**Overriding objective and parties' obligation to co-operate with the Tribunal**

**2. –** (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes **–**

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it **–**

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must **–**

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

**Case management powers**

**5. –** (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may

…

(f) hold a hearing to consider any matter, including a case management issue;

(g) decide the form of any hearing; …

**Decision with or without a hearing**

**27 –** (1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless **–**

(a) each party has consented to, or has not objected to, the matter being decided without a hearing; and

(b) the Tribunal considers that it is able to decide the matter without a hearing."

**Hearings in a party's absence**

**31.** If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

## D. The appeal to the First-tier Tribunal

4. The claimant exercised her right of appeal to the First-tier Tribunal. In her letter of appeal, she wrote that her circumstances had not changed. She completed the pre-listing questionnaire to say that she did not want a hearing, which was described as a chance for the claimant and her representative to meet the tribunal and put their case. In an accompanying letter, she wrote to say that she would not attend the hearing, as she did not want to go out on account of "bad depression, anxiety, panic attacks & phobias". She added that she could not afford the fee to obtain a "medical letter".

5. The tribunal decided that it was appropriate to proceed without a hearing. It referred to rule 27(1)(b) and to the overriding objective in rule 2. It noted that the claimant could not afford a medical letter, but said that it had her questionnaire, the health care professional's report of 2013, and an earlier health care professional's report from 2011. The claimant had referred to a GP's letter that she had submitted on a previous appeal. The tribunal made enquiries about the letter, but it was not available. From the evidence, it noted that the claimant was not under any specialist care, except for her diabetes, had had no recent hospital admissions, and was not under the community mental health team.

6. Having considered the documentary evidence, the tribunal dismissed the appeal. The judge provided detailed reasons that explained why the claimant did not have limited capability for work under Schedule 2 to the 2008 Regulations and why she could not be so treated under regulation 29 of those Regulations.

## E. The appeal to the Upper Tribunal

7. Both the First-tier Tribunal and Upper Tribunal refused the claimant permission to appeal. The latter decision was quashed on judicial review and the case was referred to me. I gave permission and directed the parties to make written submissions. Having received and considered those submissions, I directed an oral hearing, which took place on 25 November 2015. Mr Simon Howells of the welfare rights team of the London Borough of Camden represented the claimant. Ms Katherine Apps of counsel represented the Secretary of State. I allowed time for the representatives to make further submissions on issues that had arisen during the hearing. I am grateful to them both for their written and oral arguments.

## F. The Equality Act 2010 and the relevance of *MM and DM*

8. The Upper Tribunal and the Court of Appeal considered the application of the Equality Act to persons with mental health problems in *R (MM and DM) v Secretary of State for Work and Pensions* [2013] UKUT 259 (AAC); [2013] EWCA Civ 1565 and [2015] UKUT 107 (AAC); [2016] AACR 11.

9. At the hearing, the parties agreed that the duty to make reasonable adjustments under section 29 of the Act did not apply to the First-tier Tribunal. I accept that argument. Paragraph 3(1)(a)&(b) and (2) of Schedule 3 to the Act provides:

> "(3)(1) Section 29 does not apply to –
>
> (a) a judicial function;
>
> (b) anything done on behalf of, or on the instruction of, a person exercising a judicial function; …
>
> (2) A reference in sub-paragraph (1) to a judicial function includes a reference to a judicial function conferred on a person other than a court or tribunal."

In deciding whether or not to proceed without a hearing under rule 27(1), the tribunal was exercising a judicial function. Accordingly, it was not subject to the duty to make reasonable adjustments under section 29.

10. In *DC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 218 (AAC), the Upper Tribunal decided otherwise. The judge wrote:

> "5. … If there is a disadvantage to a person with a protected characteristic under the Equality Act 2010, then a public authority, which includes a tribunal, has to consider whether or not a reasonable adjustment is required. …"

That is wrong, as it overlooks the express provision of paragraph 3 of Schedule 3. In so far as the decision relies on the existence of a duty to make reasonable adjustments, it should not be followed.

11. This does not mean that *MM and DM* is irrelevant. The judgments in that case are valuable for containing evidence of the sort of problems that persons with mental health problems *may* encounter. I emphasise *may*, because each case has to be decided on its own facts and in its own circumstances. It would be as wrong to stereotype a person with mental health problems in a way that is to their advantage as it would be to stereotype them to their disadvantage. The phrase *mental health problems* covers the whole range from mild depression or anxiety to paranoid schizophrenia or sociopathy. The impact of a particular condition on an individual can vary considerable. That is why each case has to be approached individually. Nevertheless, the evidence that is referred to in those cases is helpful as part of the general education for tribunals on the difficulties that can arise in negotiating the assessment process in employment and support allowance.

12. I do not, though, accept Mr Howells' argument that *MM and DM* is in any way equivalent to a country guidance case in immigration law. Those cases derive their special status from the fact that they contain a detailed analysis of particular countries that is directed at the issues that will arise before tribunals. That is not how the evidence was received or analysed in *MM and DM*, which concerned the assessment process. The fact that the significance of the mental health problem requires individual identification and assessment is shown by the final decision in those cases: neither claimant succeeded.

13. Mr Howells referred to cases in which the Upper Tribunal had relied on expert evidence: R(DLA) 6/06, *JG v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 37 (AAC); [2013] AACR 23, and *NMcM v Secretary of State for Work and Pensions (DLA)* [2014] UKUT 312 (AAC). I accept that those cases involved expert evidence, but I do not understand their relevance to this case. They involved issues of law and matters of fact of general importance. That is not how the evidence in *MM and DM* might be relevant to other cases. They do not justify

elevating the status of that evidence beyond general awareness of the nature of problems that can arise. They do not oblige a tribunal to act outside the specific circumstances of a particular case, although those circumstances may justify further enquiry, perhaps suggested by evidence in *MM and DM*.

## G. The application of the overriding objective

14. At the hearing, the parties agreed that the issue for the tribunal had been how to apply rule 27(1) in the light of the overriding objective in rule 2. I accept that argument.

15. In *Crown Prosecution Service v Fraser* UKEAT/0021 and 0022/13/DM, the Employment Appeal Tribunal analysed the approach to mental health problems in the same way. The issue in that case was whether the employment tribunal had made an error of law by applying the duty to make reasonable adjustments when deciding whether to review its decision in Mr Fraser's case. The Employment Appeal Tribunal decided that they had not applied the duty. Cox J explained:

> "57. … The Claimant's mental impairment and its potential relevance to his conduct of the proceedings were self-evidently relevant factors that the Tribunal were obliged to take into account in exercising their discretion in this case. …"

She then cited the decision of the Divisional Court in *R v Isleworth Crown Court ex parte King* [2001] EWHC Admin 22, where Brooke LJ referred to the useful guidance in the Equal Treatment Bench Book. This is another source for the First-tier Tribunal, in addition to the material mentioned in *MM and DM*. Cox J concluded:

> "62. In our judgment the Tribunal in this case were right to recognise that they had an obligation to take into account this Claimant's mental impairment and the effect it may have had on his ability to conduct the proceedings rationally. It was one of the factors to which they should have regard in considering where the interests of justice lay. …"

16. Mr Howells also relied on the claimant's Convention rights in Articles 6 and 14, but I do not think that this adds anything to the terms of rules 2 and 27(1)(b).

17. Although, it was not discussed at the hearing, the requirements of natural justice and the Convention right to a fair hearing are additional to the requirements of rule 31: *GJ v Secretary of State for Work and Pensions, JG and SW (CCS)* [2012] UKUT 447 (AAC). The same applies to rule 27. This is worth noting, because it affects one of Ms Apps' arguments. She argued that the decision under rule 27 and the application of the overriding objective in rule 2 involved matters of judgment, the assessment of which the Upper Tribunal should not attempt to second-guess. That is how issues of judgment are approached on appeal: *Charles Osenton and Co v Johnston* [1942] AC 130 at 138. Assuming that Ms Apps is correct about the nature of a decision under rules 27(1) and 2, the same does not apply to the application of natural justice and the Convention right to a fair hearing. The issue then is not whether the First-tier Tribunal was entitled to decide as it did, but whether its decision involved a breach of natural justice or the Convention right. As the Court of Appeal decided in *Terluk v Berezovsky* [2010] EWCA Civ 1345:

> "18. Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, Lord Hope said (at §6):
>
> > '[T]he question whether a tribunal … was acting in breach of the principles of natural justice is essentially a question of law.'

> As Carnwath LJ said in *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, §50, anything less would be a departure from the appellate court's constitutional responsibility. This 'non-*Wednesbury*' approach, we would note, has a pedigree at least as longstanding as the decision of the divisional court in *R v S W London SBAT, ex parte Bullen* (1976) 120 Sol. Jo. 437; see also *R v Panel on Takeovers, ex p Guinness* PLC [1990] 1 QB 146, 178G-H per Lord Donaldson (who had been a party to the *Bullen* decision) and 184 C-E per Lloyd LJ. It also conforms with the jurisprudence of the European Court of Human Rights under article 6 of the Convention – for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant's right both at common law and under the ECHR to a fair trial.
>
> …
>
> 20. We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in *Bullen*, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was 'the' fair one."

## H. What are the claimant's mental health problems?

18. It is impossible to apply the correct approach to the claimant's case without answering this question.

19. At the hearing, the parties agreed that the claimant had mental health problems, but not how they should be characterised. Mr Howells used, as one diagnosis, agoraphobia. Ms Apps objected on the grounds that (i) that diagnostic label was not used in the documentary evidence and (ii) it did not fit with the claimant's own description of her problems. I accept Ms Apps' argument. I proceed on the basis that the claimant experienced anxiety and panic attacks, which caused her difficulties in going out on her own and coping with crowds, but which did not prevent her going out with a companion or relating to people as individuals.

20. Mr Howells also argued that it was evident that the claimant had literacy problems. Ms Apps did not accept that. I accept her argument. I accept Mr Howells' points that:

- the claimant did not complete her questionnaire or write her letter on her own;
- her signature indicates that she does not write well;
- her questionnaire says that she has "difficulty writing (spelling)".

But that is not sufficient to sustain the argument that the claimant had literacy difficulties in addition to, or that contribute in a significant way to, the problems that arose from the other mental health problems I have accepted.

## I. What should the tribunal have done?

21. This was discussed in the written and oral submissions. Broadly, the possibilities relate to:

- the form of the hearing;
- the Secretary of State's duty to disclose relevant evidence;
- obtaining evidence relevant to the claimant's case.

*The form of the hearing*

22. One of the tribunal's case management powers is to "decide the form of any hearing": rule 5(3)(g). And *hearing* is defined as meaning "an oral hearing and includes a hearing conducted in whole or in part by … telephone …": rule 1(3).

23. One consideration is whether the tribunal should have directed a hearing in a form that would allow the claimant to participate effectively, despite her difficulties. Given the claimant's difficulties and reluctance in attending at a tribunal venue, it was reasonable for the tribunal not to have adjourned to allow this. I also put to one side the possibility of a domiciliary hearing, as I understand that at that time these were not being held for reasons related to health and safety.

24. There are decisions in which the Upper Tribunal has decided that the First-tier Tribunal should have considered the possibility of a telephone hearing. In CI/2158/2015, Upper Tribunal Judge Wright found an error of law:

> "5. … In the context of a complex case where it was evident that the appellant wished to participate, moreover where it is apparent from the *Decision Notice* that the tribunal had questions to put to the appellant, and also where the possibility of a telephone hearing had been raised by the appellant, in my judgment the tribunal failed to adequately explain why it was consistent with the overriding objective to decide the appeal with no effective hearing and on the papers alone …"

I note that in that case the claimant had raised the possibility of a telephone hearing herself and the judge identified the error in the inadequacy of the tribunal's reasons, leaving open the possibility that the tribunal might have been able to justify a decision not to hold such a hearing.

25. Judge Wright referred to *SW v Secretary of State for Work and Pensions (DLA)* [2015] UKUT 319 (AAC). Upper Tribunal Judge Knowles QC there referred to the Senior President of Tribunals' practice direction on *Child, Vulnerable Adult and Sensitive Witnesses* of October 2008. Paragraph 7 of that direction says: "It may be appropriate for the Tribunal to direct that the evidence [of such a witness] be given by telephone, video link or other means …". In that case, as in Judge Wright's, the claimant "had made plain her wish to speak to the tribunal by telephone …, a wish which was repeated when she rang the Tribunals Service on 21 March 2014".

26. Mr Howells did not cite those cases, but he relied on the practice direction. I allowed time after the hearing for written submissions on those cases.

27. In his written submission after the hearing, Mr Howells argued that the tribunal should have considered the possibility of a telephone hearing. It is true that the claimant did not ask for one or even suggest the possibility, but she had no reason to believe one was possible. The overriding objective and the practice direction apply even if the claimant has not raised the possibility.

28. In reply, Ms Apps suggested a three stage approach:

- The claimant's choice should be respected.
- The tribunal should first determine whether it is necessary to hear oral evidence.
- Only if it is necessary should the tribunal consider a telephone hearing.

The cases can be distinguished because:

- The claimant in this case did not raise the possibility.
- In both cases, the tribunal's consideration had reached, or should have reached, the third stage.

29. It is beyond dispute that a telephone hearing is permissible; that is made clear by the definition in rule 1(3). It is also beyond dispute that in a particular case the tribunal may be required to consider the possibility of a telephone hearing, either by reference to the overriding objective or the practice direction. So far as I am aware, the only cases in which this has previously been considered are ones in which the claimants had raised the possibility themselves.

30. I accept Mr Howells' argument that it is necessary for the claimant to ask for a telephone hearing or to raise the possibility. That would be unrealistic unless and until the First-tier Tribunal notifies claimants that this is a possibility.

31. I accept Ms Apps' argument that the tribunal should respect the claimant's wishes and resist raising options that the claimant does not want. But that assumes the claimant's wishes are worth respecting and that depends on whether the claimant was aware of the possibility and made an informed choice. This is but one factor among many that has to be taken into account.

32. It is important to remember that the application of the overriding objective has to be proportionate. That applies to both the procedural decision made by the tribunal and to the time devoted to it. With the luxury of time, the Upper Tribunal and the representatives who appear before it can indulge in detailed analysis. In practice, the First-tier Tribunal has to make its decision swiftly without pondering every possibility and poring over the papers to extract every possible factor indicating that a telephone hearing might be appropriate.

33. I do not accept Ms Apps' second and third stages. They may have been features of the cases I have cited, but they are not essential features. There is no clear line between cases where oral evidence is necessary and those where it is not. It is always possible to make *a* decision without hearing more evidence, but more evidence will usually make the decision a better informed one, even if it does not change the outcome. The approach has to be more nuanced than Ms Apps suggests. The tribunal has to take account, as one factor among many, of the likelihood that it will be able to obtain more relevant evidence.

34. One factor that it is always necessary to consider is whether the claimant could cope with a telephone hearing. Neither Mr Howells nor Ms Apps mentioned this. The claimant wrote of her anxiety and panic. It is true that she mentioned this in the context of unfamiliar locations and crowds. But she did not have a telephone hearing in mind and she had told the health care professional that she had no problem using a phone or communicating with other people. On the other hand, the claimant gave her reasons for not attending a hearing on the basis of the description of the hearing on the questionnaire. That does not mean that they were her only reasons. It does not mean that she would necessarily have been willing to participate in a telephone hearing.

35. Finally, Ms Apps mentioned the need for the hearing to be in public in order to comply with the Convention right in Article 6, unless a private hearing could be justified. I do not see this as an insuperable problem if a telephone hearing is other indicated. After all, if the hearing is by telephone, the venue need not be local to the claimant's home.

36. My conclusion is that there is no error of law in this respect. I regularly see cases in which tribunals explain why they have not held a hearing or have proceeded at a hearing in the absence of the claimant. Often they are formulaic and indicate little more than a cursory consideration. The tribunal's reasons in this case are anything but formulaic and they disclose anything but a cursory consideration. They are soundly based in the evidence and circumstances of the case. They show that the tribunal identified all the relevant considerations that appeared from the evidence. They showed that the tribunal had even made enquiries to see if it could find the letter to which the claimant had referred. I consider that the tribunal devoted a proportionate amount of time to

analysing whether to hold a hearing. It is relevant to recall the *Terluk* approach. The issue is whether the claimant was dealt with fairly, not whether the tribunal came to the one and only perfect conclusion. The proportionality of the tribunal's time and analysis feeds into that test. Offering the option of a telephone hearing was one possibility that a tribunal might have considered, but I do not consider that taking all the information before the tribunal into account that this was necessary in order to deal with the issue fairly.

*The Secretary of State's duty to disclose relevant evidence*

37. This has recently been the subject of two decisions of a three-judge panel. *FN v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 670 (AAC) (CSE/19/2014) is being treated as the lead case. The other case is CSE/453/2013. [Both are now reported as [2016] AACR 24.] Neither was available at the hearing. I obtained one and the Secretary of State provided the other when it was promulgated. I allowed the parties time to make submissions on these decisions and their relevance to this case.

38. I can deal with these cases briefly, because Ms Apps has been able to tell me that the Secretary of State does not hold any other relevant evidence on the claimant's files. It would be an empty exercise to criticise the First-tier Tribunal for failing to ask for evidence that we now know does not exist. The tribunal had the report from the current assessment and from the previous assessment in 2011. That earlier assessment was made in connection with the conversion of the claimant's case from income support on the grounds of incapacity to employment and support allowance. I am sceptical of the value of any evidence from before the conversion process. Even if it existed, reports would relate to incapacity benefit activities and descriptors, and the evidence would have been collected with those criteria in mind.

39. Mr Howells made the point that the Secretary of State's submission to the First-tier Tribunal did not disclose that the claimant had been in receipt of benefit from 1994. As I have said, I doubt whether evidence relevant to incapacity benefit would be of much help and the mere knowledge of the award would not help the tribunal one way or the other.

*Obtaining evidence relevant to the claimant's case*

40. Although tribunals have the power to obtain medical evidence, they do not do so as a matter of routine. They rightly expect parties to provide the evidence on which they wish to rely.

41. One factor relevant to whether to exercise the power is the claimant's ability to obtain the evidence herself. In this case, the claimant had previously obtained a letter from her GP, although we do not know whether that was done on her own initiative. Ms Apps suggested two possibilities:

- the claimant could have asked the GP for a copy of the letter, which presumably would not incur a fee;
- she could have made a subject access request under the Data Protection Act 1998 for the information on her records, which would incur at most a fee of £10. This has replaced the provisions of the Access to Health Records Act 1990.

42. Another factor is whether the tribunal would have obtained evidence that would assist it. In practice, the most likely source of evidence would be the GP's records. These are obtained regularly, but not routinely. They can be helpful, but not always. The key consideration is always whether the records are likely to contain the sort of information relevant to the precise application of the descriptors. In my experience of cases involving anxiety and panic, the notes may contain

some information, but are unlikely to contain the sort of information required to decide whether the requirements of any particular descriptor are satisfied.

43. In conclusion, I cannot criticise the tribunal for proceeding on the evidence before it.