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 Manchester First-tier Tribunal dated 25 May 2016 under file reference SC946/15/03670 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 13 July 2015 is remitted 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 the tribunal judge or members who were previously involved in considering this appeal on 25 May 2016.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely 13 July 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 Liverpool within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction (3) above).

(5) The Appellant's representative is directed to file a supplementary submission with the regional tribunal office. This should include page references to (and where appropriate quotations from) those parts of the medical evidence which are relied upon. The supplementary submission should be filed with the regional tribunal office within one month of the date this Upper Tribunal decision is issued.

(6) Pages 198-215 of the original First-tier Tribunal appeal hearing bundle must be removed from the case papers used for the re-hearing. A District Tribunal Judge should check that this has been done.

(7) 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

Introduction

1. This appeal, while obviously important for the Appellant, is on one level fairly routine. The substantive issue in the case turns on whether or not the Appellant qualified for any points under the personal independence payment (PIP) activity 5 (managing toilet needs or incontinence). I am allowing the Appellant's appeal to the Upper Tribunal and sending the case back to the First-tier Tribunal (FTT) for a fresh hearing on the facts.

The wider significance of this case: a serious confidentiality breach

2. There is, however, an important procedural issue that also arises in this appeal. This concerns the responsibilities of representatives when providing evidence to the FTT on behalf of their clients. In the present case the Appellant's representative sent the FTT, shortly before the hearing, a substantial body of further documentary evidence that had been obtained from the Appellant's GP surgery. This was essentially a 350-page bundle of what would appear to be the Appellant's entire medical records. That documentation included highly confidential child protection evidence which should not have found its way into the FTT proceedings. This case should be a salutary warning for all representatives. For that reason alone I am arranging for this decision to be placed on the Upper Tribunal AAC website of decisions of wider interest.

3. In these reasons I deal first with the substantive issue about the Appellant's PIP appeal (paragraphs 11-16) before turning to the wider procedural issue (paragraphs 20-37).

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

4. So, in summary, the Appellant's appeal to the Upper Tribunal is allowed. The decision of the FTT involves an error on a point of law. For that reason alone I set aside the Tribunal's decision. The Secretary of State's representative is in agreement on that course of action.

5. The Appellant's PIP appeal now needs to be reheard afresh by a new First-tier Tribunal. I cannot predict what will be the outcome of the re-hearing. I must make it clear that 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 Tribunal will succeed *on the facts*.

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

The background to this appeal to the Upper Tribunal

7. The Appellant had previously had the benefit of an award of the middle rate of the care component and the lower rate of the mobility component of disability living allowance (DLA). On 13 July 2015 the Secretary of State made a decision which had the effect of ending the DLA award. It was decided that the Appellant scored 4 points for daily living and 0 points for mobility, and so was not entitled to an award of either component of PIP. The Appellant appealed to the FTT, following an unsuccessful request for a mandatory reconsideration.

8. A Tribunal hearing was scheduled for 14 April 2016. On 8 April 2016 the Appellant's representative wrote to the Tribunal office asking for a postponement, explaining that she had only recently had a response (by way of simply an invoice)

from the Appellant's GP surgery, having requested copies of the medical notes some months previously. The representative explained that it was anticipated the actual notes would not be available in time before the hearing. On 12 April 2016 a Tribunal registrar sensibly granted a postponement (I note that this does not appear to have been a case in which the representative was at fault for not following up an earlier request for the medical records, which might well justify a refusal by a tribunal to postpone or adjourn: see e.g. *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33 at paragraph 31 *per* Laws LJ).

9. The Tribunal hearing was rescheduled for 25 May 2016. On 17 May 2016 the Appellant's representative wrote again to the Tribunal office enclosing a 3-page submission and a bundle of some 350 pages of medical records. There were no references within the representative's submission to any of the contents of the accompanying medical records. The representative's covering letter explained:

> "We enclose a copy of our submission prepared on Mrs C's behalf along with a copy of her medical records. We apologise for the late submission of this evidence which is due to the fact that despite requesting the medical records some time ago, we only received them today."

10. The Tribunal hearing went ahead on 25 May 2016 with the Appellant and her representative attending. The Tribunal confirmed the Secretary of State's decision of 13 July 2015 and so dismissed the Appellant's appeal, although it increased the daily living points score to 6 (still insufficient to qualify for an award of PIP). The Appellant, with the help of her representative, then appealed to the Upper Tribunal. The grounds of appeal related to the Tribunal's treatment of the various PIP descriptors for the activities of (a) managing incontinence, (b) making budgeting decisions and (c) engaging with others. A District Tribunal Judge refused permission to appeal.

The proceedings before the Upper Tribunal: the incontinence descriptor

11. The Appellant's grounds of appeal were rehearsed again in the renewed application. Upper Tribunal (UT) Judge Mitchell gave permission to appeal on some but not all of the grounds. On the managing incontinence descriptor, UT Judge Mitchell commented as follows:

> "6. The representative argues the First-tier Tribunal overlooked relevant evidence (I observe that the risk of that occurring was heightened by the representative's management of the case …). The Tribunal found incontinence was not supported by the GP records and justified that finding by reference to the absence of a specialist referral and Mrs C's oral evidence describing stress incontinence. The representative points out that there had been specialist referrals and these resulted in a diagnosis of stress and urge incontinence.
>
> 7. At p.105 of the appeal papers is a letter from a "staff nurse – bladder and bowel service" dated 12th October 2015. The nurse diagnoses "stress incontinence, urgency and urge incontinence and nocturia". I reluctantly grant permission to appeal on the ground that the First-tier Tribunal may have erred in law by overlooking this evidence. I say 'reluctantly' because any error of law may have been induced by the representative's poor management of the case. But I cannot ignore the fact that the Tribunal accepted the evidence and did not direct the representative to supply a written submission identifying which features of the medical records were being relied on.

> 8. I also grant permission to appeal on the ground that the Tribunal may have erred in law by finding that continence pads are not an aid or appliance for the purposes of the PIP assessment regulations."

12. Ms Jane Blatchford, who now acts for the Secretary of State in these proceedings, supports the Appellant's appeal to the Upper Tribunal in a helpful submission. In particular, she makes three points.

13. The first is that, as UT Judge Mitchell noted, there *was* evidence in the medical reports that the Appellant had been referred for stress incontinence, urge incontinence and nocturia. Accordingly it was arguable the Tribunal had erred in law by using what was deemed to be a lack of evidence (which was not in fact the case) as its reason for rejecting the argument that the Appellant scored any points under daily living activity 5.

14. The second point is that, in keeping with the approach of UT Judge Lane in *JM v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0296 (AAC) (previously under file reference UK/5352/2014), an incontinence pad can be an "aid" for the purposes of daily living activity 5, contrary to the Tribunal's assumption.

15. The third point is that the Tribunal should have explored further the frequency at which the Appellant experienced incontinence and so had omitted to make sufficient findings of fact. Ms Blatchford argues that the Tribunal needed to make further findings of fact as to how regulation 7 (the "over 50% of the days" requirement) applied. She is content that the appeal is allowed and the matter is remitted (or sent back) for re-hearing to a new tribunal.

16. I agree with both representatives that the Tribunal's decision involves an error of law on this point, and so set aside the Tribunal's decision. In doing so, I recognise, as also did UT Judge Mitchell, that the Tribunal was in a difficult position, not least given the very late arrival of a substantial body of undigested medical notes. I also acknowledge that UT Judge Lane's decision in *JM v Secretary of State for Work and Pensions (PIP)* would not have been available to the FTT at the time of the hearing.

What happens next: the new First-tier Tribunal

17. There will need to be a fresh hearing of the appeal before a new Tribunal. Although I am setting aside the Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant is entitled to PIP (and, if so, which components and at what rate(s)). That is all a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence afresh and make its own findings of fact.

18. In doing so, of course, the new Tribunal will have to focus on the Appellant's circumstances as they were as long ago as July 2015, and not the position as at the date of the new hearing, which will obviously be at least 18 months later. This is because the new Tribunal 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 was taken on 13 July 2015.

19. In order to assist the fair and just resolution of this appeal, the Appellant's representative is directed to file a supplementary submission with the regional tribunal office. This supplementary submission may well bear considerable

similarities to the original submission dated 17 May 2016 and filed with the covering letter of that same date. However, the supplementary or revised submission needs to include page references to (and where appropriate quotations from) those parts of the medical evidence which are relied upon. The supplementary submission should be filed with the regional tribunal office within one month of the date this Upper Tribunal decision is issued.

The breach of confidentiality in the disclosure of the Appellant's medical notes

Introduction

20. I turn now to the wider and in a sense much more worrying issue. This concerns the inadvertent disclosure by the Appellant's representative of highly confidential child protection documents contained in the Appellant's medical notes (and as belatedly provided by the GP surgery that the Appellant attends).

The circumstances of this particular disclosure

21. The sequence of events is summarised at paragraphs 8 and 9 above and need not be repeated here. The disclosed medical records included a copy of the detailed minutes (running to 11 pages) of a child protection conference held in 1996. These minutes included highly sensitive information about both the Appellant and her (then?) partner. The minutes included in at least two places the following warning (emphasis as in the original):

> "STRICTLY CONFIDENTIAL
> INFORMATION GIVEN AT A CHILD PROTECTION CONFERENCE AND THE MINUTES OF A CONFERENCE ARE STRICTLY CONFIDENTIAL. THIS INFORMATION MUST NOT BE COPIED OR SHOWN, OR THEIR CONTENTS DISCUSSED, WITH ANY PERSON WITHOUT THE PERMISSION OF THE CHILD PROTECTION CO-ORDINATION UNIT OR THE COURT."

22. UT Judge Mitchell remarked as follows when giving the Appellant permission to appeal to the Upper Tribunal:

> "3. Before the First-tier Tribunal, Mrs C's representative supplied over 300 pages of her medical notes. No attempt was made to summarise these or draw salient features to the Tribunal's attention. While I fully understand the pressures faced by welfare benefits advice agencies, I should point that I do not consider this to be good practice. It is inconsistent with the duty to co-operate with the First-tier Tribunal and risks further delay in the event that the Tribunal – as it will often be entitled to do – adjourns with a direction that the representative identifies how the medical records support the case being advanced.
>
> 4. I am even more concerned about another aspect of the representative's management of the case on Mrs C's behalf. The medical records included a quantity of documents about historic child protection matters in which a specific child was named (it seems the child was subsequently adopted). These records expressly stated they were not to be disclosed without the permission of a child protection co-ordination unit. These should never have been disclosed to the Tribunal (they were not even relevant to the case being advanced on Mrs C's behalf). It seems to me that the representative probably did not even read the records before disclosing them to the Tribunal. That may seem harsh but I am in fact being charitable. If the records were read, that means the representative knowingly disclosed highly sensitive child protection information without the necessary permission.

> 5. Below I give directions requiring the representative to inform the child protection co-ordination unit of what may have been an unauthorised disclosure of child protection information. I have also instructed a clerk to the Upper Tribunal to remove the documents from the Upper Tribunal's file of papers (pages 198 to 215)."

23. It is only right to record that the Appellant's representative has made a full and contrite apology and explained the position as follows:

> "Unfortunately I did not read through every page of the medical records prior to sending them to the Tribunal. This was due to time constraints and heavy workloads. I did not anticipate that within the medical records there were pages that should not have been disclosed to me by the surgery and that I should not have disclosed to the Tribunal without the permission of the Child Protection Unit. These pages related to historic child protection matters in which a specific child was named who I understand has since been adopted. These pages had no relevance to the appeal for Personal Independence Payment and if I had read all of the medical records I would of course not have disclosed these papers to the Tribunal. I am writing to inform you of this unauthorised disclosure and also to sincerely apologise for this oversight."

24. From other correspondence on file it is clear that the representative has, as directed by UT Judge Mitchell, informed the relevant Child Protection Co-ordination Unit of the unauthorised disclosure. The Unit has since referred the matter to the information compliance team. It would be inappropriate for me to comment any further on that process, other than to observe that the Information Commissioner has a wide range of enforcement powers to deal with breaches of the Data Protection Act 1998, including the imposition of monetary penalty notices on data controllers.

The wider issues for the conduct of Tribunal proceedings: representatives' duties

25. It is, however, entirely appropriate for the Upper Tribunal to make some observations about the wider lessons of this incident in terms of tribunal procedures and the duties of Appellants' representatives.

26. I must start by acknowledging that I have not seen the terms of the request made in this case by the representative to the GP surgery. Although I have seen the agency's 'Authority Form', as signed by the Appellant in July 2015, I have also not seen the relevant welfare rights organisation's Confidentiality Policy, referred to in that document as available to its clients on request. Nor, of course, have I seen any local protocols under which the surgery operates when disclosing patients' medical records to patients' representatives acting before tribunals handling social security benefit appeals.

27. I also recognise that the Appellant's representative was herself operating under very difficult constraints. In the letter of 8 April 2016 she explained that she had requested the medical notes from the GP "some months ago". The representative had already secured one postponement, and took the decision to forward the medical notes as soon as they became available (which was just a week before the re-scheduled Tribunal hearing). Given the dire funding situation in the advice sector, I readily accept that this decision was taken both in haste and in good faith "due to time constraints and heavy workloads". In a sense, therefore, this case was an accident waiting to happen. The obvious point remains, however, that a representative should never send in evidence which has not been read, if only to ensure that the evidence is relevant to the issues to be determined.

28. From the Tribunal's perspective the starting point is the overriding objective in rule 2(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2998 (SI 2008/2685; "the 2008 Rules"), namely "to enable the Tribunal to deal with cases fairly and justly". That imperative includes "dealing with the case in ways which are proportionate to the importance of the case" (rule 2(2)(a)). Just as the Tribunal must seek to give effect to the overriding objective (rule 2(3)), so too the parties must "help the Tribunal to further the overriding objective" and "co-operate with the Tribunal generally" (rule 2(4)).

29. Rule 11(5) of the 2008 Rules further provides that "anything permitted or required to be done by a party under these Rules … may be done by the representative of that party" (except signing a witness statement). The position in the courts under the Civil Procedure Rules is that an advocate "must conduct the proceedings economically … [and under] the Civil Procedure Rules, it is the express duty of the parties, and hence their legal advisers (including advocates), to help the court to further the overriding objective" (*Skjevesland v Geveran Trading Co Ltd.* [2002] EWCA Civ 1567; [2003] 1 WLR 912 at paragraph 37). The same principles apply in tribunals.

30. The other provisions of note in the 2008 Rules are contained in rules 22 and 24. First is the requirement that when lodging a notice of appeal with the Tribunal an appellant must provide "any documents in support of the appellant's case which have not been supplied to the respondent" (rule 22(4)(c)). It is true that there is no express requirement that the documents are "relevant" (contrast the duty imposed on respondents' decision makers in rule 24(4)(b)). However, if a document has not previously been supplied but is a document "in support of the appellant's case" then by definition it is relevant. Second, rule 24(6) enables the appellant to "supply further documents in reply to the decision maker's response", a requirement which must be met within a month of the response being issued (rule 24(7)). Understandably the latter requirement is more honoured in the breach than the observance. It remains implicit that the document must be relevant. Obviously, that judgement call can only be made if it is actually read.

31. It will be recalled that in the present case the request to the GP surgery generated over 350 pages of medical notes. These records went back at least as far as 1992. The Tribunal rightly noted that the records "were largely historic". This brings into question the nature of the representative's original request to the surgery (which, I repeat, I have not seen). Given what was provided in response to the request, it was quite possibly along the lines of "please send us a copy of Mrs C's medical notes". If so, that would not have been a proportionate request in all the circumstances.

32. What is a proportionate request in the circumstances will necessarily vary from case to case. In some types of case it may be appropriate to go some considerable way back in time. For example, in appeals in the First-tier Tribunal in the War Pensions and Armed Forces Compensation Chamber issues may arise as to causation and attribution relating to incidents many, many years ago – in which case it may be highly relevant to have sight of both contemporaneous and subsequent medical records, both in service and in civilian life.

33. The present case, however, related to a PIP appeal arising out of a decision taken by the Secretary of State's decision-maker in July 2015. The critical issue for the Tribunal, therefore, was how the Appellant was functioning in her daily life in and

around July 2015. Her PIP claim form had noted her medical conditions (and relevant start dates) as being asthma (2001), bronchitis (2001), depression (2001), bipolar (2008), anxiety (2009) and epilepsy (2013). In those circumstances a proportionate request would have been for a copy of the Appellant's medical notes as from (say) 1 January 2013. An unfocussed request, and one unlimited in time, simply increased the risk that other irrelevant and indeed highly confidential information might be disclosed. The result was that the accident that was waiting to happen did actually happen.

Implications for Tribunals

34. It is not just claimants' representatives who need to heed this warning. Tribunals from time to time find it appropriate to adjourn, either on application or on their own initiative, in order for (some of) the Appellant's medical records to be obtained. In all such cases careful consideration needs to be given to why the records are being sought and the issues to which they are relevant. Appropriately focussed directions can then be framed accordingly. This will ensure that such requests are proportionate and only the necessary records are disclosed.

35. It is unclear from the file whether the Tribunal noticed the child protection conference minutes in the late evidence submitted or appreciated the significance of their inclusion in the appeal papers. It is possible, of course, that the Tribunal members thought the least said the better. The Tribunal was undoubtedly put in a difficult position as they would have had sight of the extra bundle very late. The Tribunal office received the bundle on 18 May 2016, and the papers were issued to the panel members with commendable efficiency on 19 May 2016 for a hearing only 6 days later. However, as a matter of principle the Tribunal should have made directions along the lines of those made by UT Judge Mitchell, relying on rules 2, 5, 14 and 15 of the 2008 Rules.

36. UT Judge Mitchell's direction technically only applied to the Upper Tribunal file. Of course, the same papers must be removed from any First-tier Tribunal file for the re-hearing and a District Tribunal Judge should be asked to check the papers to that end.

37. Nothing in this decision should be read as detracting in any way from the sound guidance of Upper Tribunal Judge Williams in *MS v Secretary of State for Work and Pensions (DLA)* [2013] UKUT 0454 (AAC) on the subject how tribunals should deal with late submissions and late production of evidence.

Conclusion

38. I 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 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 29 November 2016

Nicholas Wikeley
Judge of the Upper Tribunal