IN THE UPPER TRIBUNAL **Case No.** CDLA/3501/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Attendance at Oral Hearing

For the Appellant: Mr Mr M Abdillahi
For the Respondent: Mr S Cooper

Decision: As the decision of the First-tier Tribunal (made on 16 July 2015 at Watford under reference SC304/15/0014) involved the making of an error of law, it is set aside under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is remitted to the tribunal for rehearing by a differently constituted panel.

Directions:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. In so doing, it should hold an oral hearing.

B. In particular, the tribunal must investigate and decide the child claimant's entitlement to disability living allowance in respect of her renewal claim which was refused on 27 January 2015. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998, but later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

C. The Secretary of State shall provide to the tribunal, within one month of the date of the issuing of this decision, details of the full previous adjudication history concerning claims for and awards made of disability living allowance in respect of the child claimant. The Secretary of State shall also provide copies of the documents relied upon when making the previous decision to award the lower rate of the mobility component and the middle rate of the care component of disability living allowance from 25 January 2013 to 24 January 2015. If, however, this information/documentation is not available for any reason then the Secretary of State should simply indicate so, within the same time frame, giving an explanation.

REASONS FOR DECISION

What this appeal is about

1. The principle issue raised by this appeal concerns the approach to be taken by the First-tier Tribunal in circumstances where it is dealing with an appeal against a decision

concerning the renewal of an award of disability living allowance and the Secretary of State has or may have failed in its obligation to provide it with all relevant documents in his possession pursuant to rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 because he has not produced the documentation relied upon when the previous awarding decision had been made.

The background

2. The appeal concerns a renewal claim made in respect of a child who was born on 25 January 2001 and who is, therefore, currently aged 15 years. I shall call her the claimant. Her mother is her appointee. The claimant suffers from Type 1 diabetes which necessitates, amongst other things, the injection of insulin and the monitoring of blood sugar levels. It appears, although this has not been confirmed by the Secretary of State, that disability living allowance was first awarded at some point in 2007. Certainly, there was in place an award of the lower rate of the mobility component and the middle rate of the care component running from 25 January 2013 to 24 January 2015. In due course that award fell for renewal. Standard form DLA1A (the form used when renewal is being sought in respect of a child) was completed by the appointee on 9 January 2015. The overall tenor of what was stated in the form was that the claimant needed assistance concerning the monitoring of her blood sugar levels and needed supervision to ensure those levels stayed within safe limits. There was a comment to the effect that she was finding matters "very difficult to cope with" and it was said that her diabetes was not properly under control. On 27 January 2015, however, the respondent decided not to renew the award. That was, in part at least, because there was nothing to indicate any learning or behavioural problems and so it was thought she would be able to manage the condition herself for most of the time. There is no indication as to whether any of the written material which had been used in the most recent or any earlier awarding decisions had been taken into account.

3. The appointee sought to challenge the decision and wrote to the respondent about that on 5 February 2015. The Secretary of State then telephoned the appointee but, because of difficulties concerning her ability to speak English, spoke to another family member instead. According to the record of that telephone conversation it was indicated that the claimant had been able to manage her own insulin injections for the past 12 months. It was also recorded that she was able to calculate her own blood sugar levels and was aware of signals indicating a risk of a "hypo". The decision was maintained on mandatory reconsideration and an appeal was made to the First-tier Tribunal (hereinafter "the tribunal").

The appeal to the tribunal and its decision

4. There was an oral hearing which took place on 16 July 2015. The claimant did not attend but her appointee and her brother (who was later to become her representative for the purposes of the appeal to the Upper Tribunal) did. There was a Somali speaking interpreter who was there to assist the appointee. The brother did not require such assistance. A presenting officer represented the Secretary of State.

5. The tribunal had quite limited medical evidence before it. There was a letter of 6 July 2015 written by a consultant paediatrician. That letter appeared to have been written, in part at least, with a view to assisting the family with some housing difficulties. However, the letter did make mention of the fact that the claimant had been upset as a result of those housing

difficulties, had been tearful when seen by the paediatrician in clinic and had "not been doing much blood glucose testing and missing quite a lot of insulin". It was said she was due to see a clinical psychologist and then a diabetes specialist nurse. There was an earlier letter which had been written by the same consultant paediatrician on 19 March 2015, seemingly with an eye to the appeal. It confirmed the diagnosis of Type 1 diabetes and the consequent need to carry out blood glucose measurements. It was said that it was important that the claimant should eat regularly and it was opined that young people in general who do have diabetes continue to require family support and close supervision to ensure that they are "monitoring themselves appropriately".

6. Unusually, the tribunal was not provided with documentation relating to the previous awarding decision. As to that, in a written response to the appeal, the Secretary of State, having drawn the tribunal's attention to the existence and terms of the previous award simply said this:

> "The documents relating to this claim have not been enclosed but can be obtained if Tribunal wishes to view them."

7. It does not appear from what is said in the tribunal's statement of reasons for decision ("statement of reasons") that it did actively consider whether or not to call for those documents. Indeed it did not mention them. It did receive oral evidence both from the child claimant's appointee and from her brother and it summarised what the two of them had to say at paragraphs 3 and 4 of the statement of reasons. It would appear from the content of those paragraphs that the appointee gave a more favourable picture than did the brother regarding the claimant's ability to manage her condition. It made reference to the letter from the paediatrician of 19 March 2015 though not to the one of 6 July 2015. It then went on to explain why it was dismissing the appeal and deciding that renewal of the previous award was not appropriate. As to that, it said this:

> " 5. … the tribunal reached the following findings on the balance of the evidence. The appellant suffered with Type 1 diabetes, which was generally controlled but which led her to have days – approximately once a month – where she suffered hypos and her blood sugar level remained high and effectively was uncontrolled. She was able to predict when this was happening and was able to stop what she was doing and seek help. In 2014 she had a number of hospital admissions and in particular one in April 2014. She did not generally suffer with low blood sugar levels and there was no evidence that she had fainted or collapsed as a result of her diabetes or lost consciousness or been confused as to her whereabouts or condition. The hospital letter, which sought to support her claim for benefits merely made the general point that young people required supervision from adults to monitor their condition – a general proposition did not advance the claim for the appellant.
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> 6. The tribunal were interested in what this appellant could do for herself and what she needed assistance or supervision with. There was no question that there would be occasions where she would require some greater assistance from her family or the medical profession if her blood sugar remained high. Quite naturally occurring within a household and family unit, there would be an ongoing and additional level of monitoring but this did not amount to additional attention or supervision. Instead it would form a natural part of conversations in the house where for example the appellant's mother or siblings would periodically ask [the claimant] if her sugar levels remained within appropriate levels and how she was feeling generally or getting on with her injections.

> 7. For at least six months prior to the renewal date and decision, [the claimant] was administering her insulin injections herself and managing her blood glucose levels herself. She did this in the morning, once at school later in the morning, and then twice later in the day. Had she not been able to do this, the tribunal may well have reached a different conclusion, but it found as a fact that she was managing her condition full and ably. This was to be expected and was reasonable given that [the claimant] is an intelligent and able young lady who fully participated in all school activities and was able to socialise with friends and family out of school. She had no cognitive or mental impairment that would impact on her ability to cope with her condition and the evidence was that she was more than able to do so herself. There could be no entitlement to the care component at any rate. This was because the appellant's needs were not substantially in access (sic) of a child of a similar age.
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> 8. As already noted the appellant had not had any episodes of fainting and losing consciousness either indoors or outdoors and was able to go out of the house by herself to the local shops. No doubt she preferred to go out with family and friends but there was no reason why she could not go out by herself as appropriate to her age. There was no risk to her being outdoors by herself and given her sound mental state could manage an unfamiliar (sic) if called upon to do so. There could be no entitlement to the lower rate of the mobility component and as such the tribunal were bound to refuse the appeal. In so doing the tribunal stress to the appellant that this was because the facts of the case and her own competence in managing a serious condition meant that she did not meet the legal criteria and not because the witnesses were not believed or that the tribunal did not accept that her life was far more onerous than a child of a similar age without Type 1 diabetes. Essentially the tribunal were considering the renewal application at a time where the evidence indicated that due to her age [the claimant] was now on the whole able to manage and control her sugar levels based on her own experience and awareness."

8. Hence, the appeal failed.

The proceedings before the Upper Tribunal

9. It was at this point that the child claimant's brother commenced acting as her representative. An application for permission to appeal to the Upper Tribunal followed. Permission was refused by a district tribunal judge of the First-tier Tribunal and the application was renewed with the Upper Tribunal. The grounds, essentially, amounted to a contention that, during the course of the hearing, the brother had challenged the competence of the interpreter but the tribunal had failed to act upon it. An oral hearing of the application was sought and that application was granted by Upper Tribunal Judge Lloyd-Davies. After hearing from the claimant's representative I granted permission to appeal albeit not on the basis it had originally been sought. Rather, I granted it because I thought the tribunal might have erred in failing to consider calling for the documentation relating to the previous awarding decision. I also expressed the view that the Secretary of State might have been in breach of rule 24(4)(b) of the Rules of Procedure referred to above in failing to produce that documentation as opposed to simply making the tribunal aware of its existence. I enquired as to whether the stance taken by the Secretary of State in not producing the documentation marked any change of practice. I raised the possibility that the duty upon tribunals to explain a departure from a previous awarding decision when deciding an appeal against a renewal decision unless the reasons for the departure are otherwise obvious, as explained in *R (M) 1/96*, might mean that documentation concerning the previous awarding decision should always be submitted to tribunals. I also wondered whether anything which had been said in *FN v The Secretary of State for Work and Pensions* [2015] UKUT 670 (AAC) and *ST v The Secretary of State for*

Work and Pensions [2012] UKUT 469 (AAC) might have some bearing upon the issues albeit that those cases concerned employment and support allowance.

10. The Secretary of State's representative produced a written submission of 1 June 2016. The submission was received slightly later than the time permitted in my directions but, despite an objection made by the claimant's representatives, I admitted it. The content of the submission was to the effect that there was no change with respect to practice, that it was not always the case that a First-tier Tribunal should seek documentation relating to a previous award, that the fact this tribunal had not sought the documentation suggested it had not considered it to be relevant and that, in any event, it was apparent from what had been said by the tribunal in its statement of reasons, why it was not making an award upon renewal. The claimant's representative, by way of written reply, suggested that the documentation regarding the previous award would have represented "an important starting point" and that the tribunal's factual findings should have been informed by the "claimant's history". Further, a claimant ought to be able to see all material documents held by the Secretary of State which might affect the case. The documents were available and could easily have been produced.

11. I held an oral hearing of the appeal at the request of the claimant's representative. He attended and provided oral submissions as did Mr S Cooper for the Secretary of State. I am grateful to both of them for their assistance.

12. At the hearing, the claimant's representative maintained the arguments surrounding the interpretation issue as well as those concerning the documentation. He asserted that the condition of Type 1 diabetes does not get better with age. As a person gets older they require more injections and the condition can, therefore, become more difficult to manage. There might be a link between previous problems and current problems. Without calling for the documents the tribunal could only speculate as to the basis for the previous award. The previous award documents would have shown what the appointee did for the claimant in the past and that might be relevant as to what she has to do now. Accordingly, the claimant had not had a "fair chance".

13. Mr Cooper observed that what had been said in *ST* and *FN* had been concerned with employment and support allowance but submitted, nevertheless, that the reasoning might also be relevant to disability living allowance. He accepted that the Secretary of State had been in breach of his obligations under rule 24 of the Rules of Procedure and acknowledged that if the Secretary of State has relevant material he should produce it. However, a failure of the Secretary of State in this regard will not always translate into legal error on the part of a tribunal if it chooses to proceed. Here, it had dealt with matters very fully. It had addressed the evidence which was before it and had explained its reasoning sufficiently and to the standard required in *R(M) 1/96*. Accordingly, it had not erred in failing to call for the previous papers. Mr Cooper did, though, allude to the possibility that, as a separate matter, the tribunal might have erred in referring to what it was that the appointee was "obliged" to do for the child claimant rather than what was reasonably required by the claimant. However, he stressed that he was not making any concession in that regard.

Discussion

14. The Secretary of State clearly had, in his possession, the documents which had been relied upon when the previous awarding decision had been made. That was expressly

acknowledged. Nevertheless, whilst bringing the existence of those documents to the attention of the tribunal and so not hiding them in any way, he had not produced them. Given that, at least in my experience, such documentation is routinely produced and given that it has been confirmed there has been no change in the practice, it seems to me that the failure to do so here was something of an aberration.

15. Rule 24 of the Rules of Procedure requires a decision maker, upon receipt of a copy of a notice of appeal sent by the tribunal, to deliver a response to the appeal to the tribunal. According to rule 24(4) the decision maker must provide with the response –

> " (b) copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise;"

16. Pausing there, it might be thought that the word "relevant" as used here should be interpreted as meaning something like potentially relevant since the actual relevance or otherwise of a specific item of evidence might only be established after a full consideration of the issues such as will take place during the appeal process.

17. Strictly speaking, it is not necessary for me to decide whether the Secretary of State is always obliged to produce the documentation used when a previous awarding decision was made in circumstances where the appeal is concerned with a renewal of the previous award. That is because, in this particular appeal, Mr Cooper accepts that the Secretary of State was so obliged. I am sure Mr Cooper was correct to acknowledge that. Without deciding the point, it may be that very rarely there will be particularly unusual circumstances where the documents will obviously not have relevance such that the duty to disclose does not arise. That, I suppose, might be so in circumstances where it is clearly accepted by all parties that the previous decision was based upon a condition in respect of which a claimant has entirely recovered and renewal is pursued only on the basis of a new and entirely different and unrelated condition. Obviously, that would be very unusual though it is not, I suppose, entirely inconceivable.

18. Other than the above though, and again without formally deciding the point because I do not have to, it does seem to me that it is very likely indeed that such documentation will have at least a degree of relevance and, therefore, ought properly to be disclosed by the Secretary of State for the purposes of an appeal regarding a renewal decision. It is not, in my judgment, acceptable where such documentation is of relevance or potential relevance for the Secretary of State to simply say, as here, that the documentation is available and can be produced if the tribunal requires it. That is because to take such an approach would be to ignore the mandatory nature of the duty. It is mandatory because of the inclusion of the word "must" within rule 24(4). Further, such an approach is unhelpful because a tribunal which has convened to decide such an appeal may well feel a natural impetus to get on with the job and a claimant might well have an understandable desire to get matters over with. That combination might lead, in some cases, to tribunals understandably proceeding without evidence that might have made a material difference to the outcome rather than adjourning to obtain it.

19. My real focus, though, has to be upon the approach of the tribunal in circumstances where, as here, the rule 24 duty has not been complied with. The claimant's representative's submissions, on one view, do go so far as to suggest that a tribunal will always be under a duty to adjourn in order to obtain the missing evidence. I do not agree with that. To lay down such

a requirement would be to adopt an unduly inflexible approach and might lead to unnecessary adjournments. It may be, for example, that a tribunal understands the basis for a previous award, perhaps because that is explained in the appeal response or in some other document before it and already has some medical evidence pertaining to matters as they stood when the previous awarding decision was made. It may be, even absent that, the tribunal could safely proceed if the evidence in totality was so full and cogent that it felt, notwithstanding what had gone before and any evidence as to that, that the outcome on the appeal before it is inevitable. In particular, if the current evidence was such as to persuade it that an award of the maximum amount of disability living allowance available was appropriate there would seem to be no value at all in calling for the earlier evidence. Putting all of that together I conclude that it cannot be said, as a matter of law, that a tribunal will always be obliged to adjourn in order to obtain documentation relating to the earlier awarding decision when it is considering, by way of appeal, a renewal decision.

20. Having said all of the above, it does seem to me that, in general terms, tribunals should be very cautious in deciding to, as it were, "bat on" in circumstances where such material has not been produced but should have been. First of all, it will often be of some significance to know what had been said by a claimant as to her disabilities at the time leading up to a previous award. That will be apparent from completed application forms. There may well be medical evidence touching upon the same medical conditions which are relied upon in the context of the renewal claim. Further, such evidence may have enhanced relevance in circumstances (and it seems to me this is often the case) where a claimant asserts on renewal that he or she has the same or a greater level of disability as when a previous award had been made but that the Secretary of State has either not renewed or has renewed at a lower level. Medical evidence might also be thought to be of particular assistance where there is a degenerative condition such that overall improvement might be unlikely. Further still, and as already noted, there is the requirement stemming from what was stated in *R(M) 1/96* for tribunals to explain, in particular for the benefit of the losing party unless it is obvious, why a different outcome is being reached to that which had been reached previously. *R(M) 1/96* is something of an "old standard" if I can put it like that but the duty imposed therein, whilst not a demanding one is an important one as recently recognised in *SF v SSWP (PIP)* [2016] UKUT 0481 (AAC). In my judgment it might, in many cases, be quite difficult for a tribunal to adequately fulfil this duty without evidence concerning not only the level of the previous award but the basis upon which that level was considered to be appropriate. These are all potentially legitimate considerations for a tribunal to take into account when faced with non-production of such evidence and it will also be guided, of course, by the content of rule 2 of its Rules of Procedure and, in particular, the requirement to deal with cases fairly and justly.

21. Applying all of that to the current case, I see some force in Mr Cooper's submissions to the effect that the tribunal had clearly been aware of the previous award and its level but had considered matters with some care on the basis of what appeared to be the more up to date position. Of course, its rationale was to the effect that the claimant, whilst still a child, was now older and more able to manage her condition herself and that the evidence, at least that of the appointee, supported that view. Further, there was the evidence indicating that there had been a relatively recent change of circumstances since the previous awarding decision in the sense that she was now administering her insulin injections and managing her blood sugar levels herself as the tribunal noted at paragraph 7 of its statement of reasons. Having said all of that, the tribunal did not seem to even consider the possibility of calling for the earlier evidence despite its having been made clear to it that it existed and was available. There is

some force in the claimant's representative's submission that, without the documentation, the tribunal could not have known what the basis of the earlier award had been although I accept, on the facts, that it might have been relatively easy to infer. Nevertheless, the Secretary of State has not produced that documentation to the Upper Tribunal and there remains the possibility that it might contain something of relevance which would have been capable of impacting upon the outcome of the appeal. In the circumstances I have concluded that the tribunal did err in failing to, as a minimum, acknowledge the existence and availability of the evidence and to consider whether to call for it. On this basis, therefore, I have decided that its decision falls to be set aside.

22. The remaining ground of appeal, as noted above, was concerned with interpretation at the hearing. However, a Somali speaking interpreter had been requested and a Somali speaking interpreter had been provided. Neither the record of proceedings nor the statement of reasons contains any indication that there was a challenge to the quality of interpretation or that there was any difficulty with respect to it. In these circumstances I do not consider that that particular ground is made out although it makes no difference to the outcome. Further, given what I have already decided, it is not necessary for me to consider whether there might have been an error of law along the lines hinted at by Mr Cooper.

23. In the circumstances, therefore, the tribunal's decision is set aside. Since there are further facts to be found and further evidence to be obtained, I have decided to remit to a new and differently constituted tribunal so that the decision may be remade. I have directed that there be an oral hearing and, of course, the appointee will, once again, require the services of a Somali speaking interpreter. I will not make a specific direction as to this but it would be prudent to ensure that a different Somali speaking interpreter is available for the rehearing. I have directed production of the evidence concerning the previous award so that will be available, barring any mishap or unanticipated difficulty, to the new tribunal. The new hearing will be a complete rehearing and all matters will be considered entirely afresh. I would, though, wish to point out that the claimant and appointee should not assume simply because I have set aside the first tribunal's decision that I am of the view that, ultimately, the appeal ought to succeed. That will be entirely a matter for the good judgment of the new tribunal.

24. The appeal to the Upper Tribunal, therefore, succeeds on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **14 December 2016**