DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Gray **CPIP/838/2017**

Decision: This appeal by the claimant succeeds.

Having given Permission to appeal on 4 April 2017 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Bristol and made on 29 July 2016 under reference SC 068/16/01002. I refer the matter to a completely differently constituted tribunal in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Reasons

1. At the heart of this appeal is the potential entitlement of C to a Personal Independence Payment (PIP) following transfer at 16 from Disability Living Allowance. An award was refused in a decision made on 23 March 2016, and that decision was confirmed on appeal to the First-tier tribunal (FTT). I granted permission to appeal on 4 April 2017, the grounds of appeal filed behalf of the appellant by Ms Mc Donagh of RAISE (a benefits and money advice charity) being arguable. I identified additional arguable issues and directed a response from the Secretary of State. That is now to hand. Nether party has sought an oral hearing and I am able to decide the matter justly on the basis of the papers before me.
2. The main ground of appeal was that the FTT should have adjourned to enable the production of a medical report that C's mother told it she had given to her representatives. They had prepared a submission but had not attended the hearing, and the report was absent from the tribunal bundle. The report was referred to in a set aside application at the FTT although not produced until the application for permission to appeal before me. I refer to it as the Foulkes report. Dated 18 March 2016 it supplements another report dated 1 March 2016 (the CAMHS report) and supports the mother's account to the FTT that C had been diagnosed as having an autistic spectrum disorder (ASD).
3. On behalf of the Secretary of State Ms Lancaster accepts that all but one of the arguable issues set out by the representative and then by me are material errors of law. That single point is no longer an issue in light of the support in the other aspects, and I will not address it.
4. As both parties are agreed that the decision of the tribunal was made in error of law I need not give detailed reasons.

The errors of law

5. On the main ground concerning the possible adjournment for, and, before me the status of the Foulkes report, I agree with Ms Lancaster that the essence of the evidential issue is less the technical application of the doctrine in *Ladd-v-Marshall* as extended by *Hussain-v-Secretary Of State for Work and Pensions [2016] EWCA Civ 1428* (as I had adumbrated in my grant of permission) and

more a straightforward case of a mistake of fact giving rise to unfairness under the tests summarised in *E & R -v -Secretary of State for the Home Department [2004] EWCA 49 at [66].* There was a mistake of fact that C did not have an ASD diagnosis: [17(h)] *"The tribunal was not satisfied that a diagnosis of autism had been made because there was insufficient medical evidence before the tribunal to suggest this diagnosis had been made, no such medical evidence being before the tribunal at the date of the hearing and no such medical evidence being submitted to the tribunal after the date of the hearing but relating back to the appellant's circumstances as at the date of the hearing."* (I observe in passing that, the decision notice refusing the appeal having been issued on the day of the hearing, the tribunal's explanation of why it did not adjourn cannot encompass matters occurring after that. Similar remarks are made in [10 & 11]).

6. It is clear from the terms and tone of paragraphs [10 &11] (which are lengthy, and I will not set them out, but they include references to 'the alleged report') that the FTT did not accept the existence of the diagnostic report. This mistake was of importance due to its likely effect on the treatment of the rest of the mother's evidence regarding C's behaviour and her needs. In light of the remarks at [38] "*Tribunal found the mother's claims to be inaccurate, improbable and exaggerated and an attempt to create reasons (which did not exist) to establish eligibility for PIP"* it is clearly material. There are other errors. I will set out the most important.
7. Another error played a part in the FTT impugning the mother's credibility. The mother took issue with the report of the healthcare professional (the HCP report). At [28] in respect of the mother's disagreement with aspects of that report it was said that *"no complaint has been lodged by mother or indeed by the appellant about the HCP, her conduct, or the accuracy of the report. No GPs report has been produced challenging the accuracy of the content of the HCP assessment."* I deal below with the expectations of a litigant providing a rejoinder to an HCP report, but in respect of the lack of complaint affecting the credibility of the appellant I cite my own decision in *KN-v-Secretary Of State for Work and Pensions [2016] UKUT 521 (AAC).* In accepting the appellant's representative's point that for many benefit claimants the appeal process is difficult without compounding it with a formal complaint, I said:

> *24 There is no legal requirement for a complaint to be made in tandem with an appeal, and it seems to me wholly wrong to use the absence of such a complaint as a significant credibility pointer. Such a complaint would be no more than a previous consistent statement, and, although there are no technical issues as to the admissibility of these in an inquisitorial tribunal it must not be forgotten that their treatment in other legal fora[1] is prescribed due to their self-serving quality and any slight probative value they may have being generally outweighed by the need to investigate such statements of limited relevance[2]. As a natural further step from Mr Hampton's submission in this context, if a complaint had been made and dismissed that could surely not be a reliable indicator as to whether or not the tribunal should*

[1] E.g. Civil Evidence Act 1995 section 6(2)

[2] Fox –v-GMC [1960] 1 WLR 1017 (Privy Council) following R-v-Roberts [1942] 1 All E.R. 187

accept the appellant's account of the conduct of the examination or the accuracy of the report, because it is the task of an independent tribunal to decide what evidence it accepts or rejects; it cannot abdicate that decision to another investigative body, indeed it should be highly circumspect about allowing such a decision to influence it at all since it knows little if anything about the standards and operating procedures under which it was made.

8. Although the statement of reasons says at [21] that the tribunal was required to consider **all** of the evidence (my emphasis) at [22] it refers to the tribunal preferring the report of the healthcare professional *"as opposed to the remaining medical evidence for the following reasons"* which are then given. There is no reference there to the evidence of the mother, and the medical and 'other' evidence is separated elsewhere in the statement. Overall the language suggests that the FTT did not look at the totality of the evidence and evaluate its different strands within the context of the whole but made a division between medical evidence and other evidence (the other evidence being the mother's account of C's day-to-day needs). That was wrong: *Re W-P (Fact-finding hearing) [2009] 2 FLR 200 at [12]; Re T (Abuse: Standard of Proof) [2001] 2 FLR 838; Karankaran-v- Secretary of State for Home Department [2000] 3 All ER 499 at 477.*
9. That error was compounded by the notion, which comes across from paragraphs [28] and [37] in particular, that in order to show entitlement it was for the appellant to provide medical evidence to contradict the Secretary of State's medical evidence: at [37] for example, having said that the HCP report was preferred because it focused on the activities set out in the PIP descriptors *"in the judgment of the tribunal there was insufficient other medical evidence to challenge, contradict or place in issue the findings of the nurse."* I explained the fallacy of this approach in *MW v Secretary of State for Work and Pensions [2016] UKUT 076 (AAC)* saying:

20. …What is impermissible is a blanket assumption that expert evidence will always, or will generally, be of more value than the lay person's account. The decision of Upper Tribunal Judge Ovey, CW v Secretary of State for Work and Pensions [2011] UKUT 386 (AAC) contains useful comments on the matter:

24. In my judgment, the Secretary of State rightly regards CIB/16401/1996 as containing useful guidance. That decision makes clear that there is no general rule that where there is a difference between the evidence of a medical professional producing reports for the use of the Department of Work and Pensions in making decisions as to social security benefits and the evidence of a claimant, the evidence of the medical professional should be preferred. It may be a legitimate conclusion in a particular case that a medical professional's view is to be preferred because it is more objective and independent, but that is a conclusion only to be reached after a consideration of the particular evidence, and the claimant should not be left in the dark as to what the tribunal made of his or her evidence: that is, whether it was honest but inaccurate, was an unconscious exaggeration or was a deliberate exaggeration.

10. The premise that the Secretary of State's medical evidence should be accepted unless there is cogent evidence to challenge it also ignores the *'Kerr* principle' derived from *Kerr v Department for Social Development [2004] UKHL 23* that this is an arena in which decision-making is on a co-operative basis, that is to say that the decision-makers' object is to achieve the right result as to benefit entitlement at the end of the day without unnecessary reliance upon evidential constructs such as the burden of proof.

11. Additionally the FTT said *"the tribunal did not ignore the medical evidence produced by the appellant but in the judgment of the tribunal this was insufficient to actually challenge the report of the nurse in connection with the appellant's needs and ability to carry out the activities associated with the descriptors upon which she sought to rely."* This remark at [29] both supports my reading of the other paragraphs and appears to envisage a judicial review type approach by the FTT to its role rather than that of an appeal *de novo* with the FTT standing in the shoes of the Secretary of State which is provided for by statute *(R (IB) 2/04).* This also appears from paragraph 17 with its references at (d) *"There was insufficient medical evidence before the tribunal to challenge, contradict or place in issue the findings or conclusions of the nurse"* and (e) *"the conclusions of the Decision Maker to award Nil points for Daily Living and Nil points for Mobility was reasonable, proportionate and in accordance with the evidence."*
12. There is dissonance between the statement of reasons and the decision notice issued on the day of the hearing (page 124). At [5] of that document it says "*Whilst the tribunal accepts that Miss F has the conditions set out at page 72 of the bundle, the nature and extent of the resulting limitations are insufficient to score the required number of points.."* That statement cannot be correct in view of the finding at [38] that the mother's 'claims' were "*an attempt to create reasons (which did not exist) to establish eligibility for PIP".* That inconsistency vitiates the reasoning: *LA v Secretary of State for Work and Pensions [2014] UKUT 482 (AAC): [12]* "*While there may be two documents involved, there can only ever have been a single reasoning process. Therefore, if the contents of the two documents are inconsistent, the Tribunal will not have given adequate reasons".*

Remit or re-decide?

13. I have considered whether I should properly decide this case myself rather than remit to the FTT, given particularly that the case was before the FTT as long ago as 29 July 2016. There has been delay. The application for permission to appeal to me was late, but I waived the lateness in view of the arguable merits. However I sit alone, whereas a first-tier tribunal hearing PIP appeals comprises a judge, a medical member and a member with experience of disability. It is important for me to consider whether any decision that I make will be deficient for the lack of that expertise.
14. Whilst the diagnosis set out in the Foulkes report provides a basis for the mother's concerns about C, a matter about which the earlier FTT clearly had doubts, it cannot without more enable me to make findings of fact, because, although it might be said to accept the mother's account set out in the CAMHS report there is no evaluation in terms of how that account translates in terms of needs and difficulties for C and I lack the requisite expertise to interpret either report in that way. Regrettably, therefore, I must remit to the FTT rather than re-decide the matter myself.
15. I note that C's GP deals with one short but troubling matter in his recent letter (dated 5 July 2017) and explains that he is happy to provide more detail if asked. It seems to me that those representing C need, in her interests, to take advantage of that and request some evidence setting out any concerns that doctor has, perhaps including the reasons for the referral to the Child and

Adult Mental Health Services which resulted in the consultation for the purposes of a decision to be made as to C's medical condition and her needs.

16. As the FTT decides the facts it is for that body to assess the evidence and decide what matters carry weight. It will do that using its expertise. I would mention, however, some matters within the report of the healthcare professional which have led me to direct the Secretary of State to provide any medical evidence which remains in existence from the prior DLA claim.
17. A number of references are made by the nurse carrying out that assessment to "the Typical Day". This is in the context of a comparison between that and what she observed when assessing C. I cannot find "the Typical Day" in that report, nor can I find any place in the claim pack in which the applicant is asked to set out details of a typical day. I do not know whether this report simply lacks something that other PIP reports have about that, or whether this is terminology imported from another benefit where the assessment report matrix provides for such a narrative. It may be an evidential limitation. Further, there appears to be some difference between the nurse's views as articulated in respect of descriptors where it is said that there was 'no report of significant difficulty'. As to engaging with others both the claim pack and the initial remarks made to the nurse at the consultation are to the effect that C has such difficulties in different ways and in particular when engaging with men, even male professionals.
18. I would add further that given the nature of the difficulties put forward it will be critical for the FTT to establish whether and to what extent, with focus on the terms of regulation 4 in relation to the quality of performance of the activities in addition to the rule set out in regulation 7 as to the need for performance to be affected for the majority of the time. As to the application of regulation 7 the decision of Upper Tribunal Judge Hemingway in *TR-v- Secretary of State for Work and Pensions [2015] UKUT 0626 (AAC)* is likely to be pertinent. It establishes that if a claimant is unable to perform an activity for part of a day that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34].

Extraneous matters

19. There is a matter which I should mention, although it is not an issue in the appeal itself. It concerns the legal status of the appellant, which I direct the Secretary of State to clarify. She is now 17. Previously whilst entitled to a disability living allowance prior to her attaining 16 her mother is likely to have been her appointee under regulation 43 Social Security (Claims and Payments) Regulations 1987. After her 16th birthday she could act for herself (regulation 43(7)) unless the Secretary of State had concerns otherwise. There are references both in the record of proceedings and the submission of the Secretary of State to what appears to be her mother's current position as appointee within these proceedings. The case has not been registered with HMCTS on the basis that there is an appointee. This is unlikely to cause any practical difficulties but it should be clarified. The Secretary of State will know whether she has an appointee for benefit purposes.
20. I have directed a re-hearing, and note that, because C attains the age of 18 on 9 September 2017 and I write this at the end of August the re-hearing will take place after her birthday. Although I make provision in my directions for C to attend the hearing should she wish to do so the indications in the papers

are that she does not. There may be an issue as to the extent to which her views are respected: the statement of reasons shows a good deal of concern expressed on the part of the FTT as to C's absence, and consideration was given to the issue of a witness summons for her attendance, although this was not done [6-8]. I remind the fresh tribunal that despite turning 18 C may yet fall within the terms of the Practice Direction issued on 30 October 2008 by the then Senior President of Tribunals in respect of witnesses who are children or otherwise vulnerable, given the diagnosis now available and the recent letter from her GP (above at [25]) which contains a diagnosis of anxiety and refers to self-harm.

In conclusion

21. I remit the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.
22. The appellant must understand that the fact that her appeal has succeeded at this stage on a point of law is not to be taken as any indication as to what the tribunal might decide as to the facts in due course.

DIRECTIONS

1. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.
2. The case will be listed as an oral hearing in front of a freshly constituted tribunal. C may, but need not attend. Her mother is advised to attend.
3. The Secretary of State shall, within 28 days of the issue of this decision, deal by filing information evidence or otherwise with the FTT, as follows:

(i) Clarify whether C has an appointee for benefit purposes.
(ii) Confirm whether or not a fresh claim has been received since the decision under appeal.
(iii) Provide any medical evidence which is available from the former DLA claim.

4. C's representative shall consider obtaining further medical evidence, including approaching her GP. All should be aware that the new tribunal will be looking at C's health problems and how they affected her day-to-day life in relation to the qualifying periods for entitlement to a Personal Independence Payment, but that it must not take into account matters which did not obtain at the date that the decision under appeal was made 23 March 2016. That does not mean than later matters are never relevant, but their relevance is limited to them shedding light on what the position was likely to have been at that time.
5. The new panel will make its own findings and decision on all relevant descriptors.

Paula Gray

Judge of the Upper Tribunal **Signed on the original on 29 August 2017**