IN THE UPPER TRIBUNAL **Case No.** CPIP/2050/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: Since the decision of the First-tier Tribunal (which it made at Wakefield on 11 May 2017 under reference SC246/16/02526) involved the making of an error of law it is set aside. Further, the case is remitted for a complete rehearing by a differently constituted panel of the First-tier Tribunal.

DIRECTIONS FOR THE REHEARING

A. The tribunal must undertake (by way of an oral hearing) 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.

B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 16 March 2016.

REASONS FOR DECISION

1. The claimant, who was aged 54 years when the Secretary of State decided her claim for a personal independence payment (PIP) is profoundly deaf. She has been so since very early childhood in consequence of her contracting meningitis only a few weeks after her birth. It has not been asserted that she has any other disabling conditions.

2. She was previously in receipt of the lower rate of the care component of disability living allowance but it became necessary, as a consequence of that benefit being replaced by PIP for her to claim PIP. She did so on 16 March 2016 and on 1 June 2016 (but communicated on 9 June 2016) the Secretary of State decided that she scored 8 points under the activities and descriptors concerned with the daily living component but no points at all under the activities and descriptors concerned with the mobility component. That translated into an award of the standard rate of the daily living component of PIP only. The award commenced on 6 July 2016 and was for an ongoing period. But she was not content with that and assisted by a representative from the Kirklees Benefit Advice Service she sought a mandatory reconsideration. Her representative wrote "As has been explained [the claimant] is pre-lingually deaf and can only communicate via BSL. Because of this she should have been awarded points for reading, and as budgeting requires the ability to read, points for budgeting. In addition she should have been awarded points for planning and following a journey". Of course, and at the risk of stating the obvious, the initials BSL stand for British Sign Language. Since the Secretary of State did not alter the

award upon mandatory reconsideration the claimant appealed to the First-tier Tribunal ("the tribunal").

3. There was an oral hearing at which (unusually) both parties were represented. The claimant gave evidence with the assistance of a BSL speaking interpreter but it is apparent from the record of proceedings and the tribunal's statement of reasons for decision (statement of reasons), that she would occasionally choose to bypass the interpreter and communicate with the tribunal by writing down on paper and in English, what she wanted to say.

4. The tribunal dismissed the appeal but did confirm the award of the standard rate of the daily living component. That is because it agreed with the Secretary of State that daily living descriptor 7d (Needs communication support to be able to express or understand basic verbal information), which scores 8 points, applied. But it did not award any other points at all. It noted in its statement of reasons, that the claimant had given it handwritten notes during the hearing and it found that she had previously studied book-keeping at college; that she had held down a number of jobs at various times including one involving filing and computer work; that she had passed her driving test; that she was able to read and fully understand her bank statements; and that when she went to visit the GP or the dentist she would "write down relevant advice and information". It also found that she would drive to supermarkets with which she appeared to be familiar and would sometimes drive into Leeds (she lives in Batley which is not very far away from Leeds). Those findings have not subsequently been contested.

5. The claimant, through her representative, sought and obtained permission to appeal to the Upper Tribunal. Her grounds were to the effect that BSL, as opposed to English (with which in light of the uncontested findings she is clearly also familiar), is to be regarded as her native language. So, ran the argument, since BSL is a language without a written component it followed that she was unable to read complex or simple written information in her native language and should, therefore, score 8 points under daily living descriptor 8e. But to make that argument understandable it is necessary to set out daily living activity 8 and its associated descriptors and the definitions of "basic written information" and "complex written information". I shall do so shortly. There were other grounds which amounted to contentions that the tribunal, in considering the possible applicability of the descriptors linked to activity 9 (Engaging with other people face to face) had failed to investigate her ability to interact with strangers as opposed to family or friends; and that it had failed to adequately consider any possible entitlement to points under the descriptors linked to mobility activity 1 (Planning and following journeys). Permission was granted by a District Tribunal Judge of the First-tier Tribunal who thought it would be of assistance to have a ruling from the Upper Tribunal concerning the BSL point. He posed a question as to whether BSL is a language at all or whether, as he put it, "BSL is a form of communication, the native language being English". The grant, though, was not limited.

6. In issuing directions to the parties I touched upon the possibility that since certain of the descriptors linked to activity 8 sought to test the ability to read or understand written information, one possible consequence of concluding that the

claimant's native language is BSL (not a written language) might be that she would be precluded from scoring any points under those descriptors simply because they would have no application. In other words, I thought it might be, if the claimant's representative's approach were to be accepted, that a person whose native language has no written component could never score points under descriptors which only test the ability to read or understand written material. I invited the parties to comment.

7. I have subsequently received a short written submission from the claimant's representative together with one brief clarification. I have received a somewhat lengthier (though certainly not overlong) submission from Mr RJ Whitaker now acting on behalf of the Secretary of State. I am very grateful to both representatives. In the event, whilst they do not agree about the activity 8 issues, there is agreement that the tribunal erred with respect to its approach to mobility activity 1. They also appear to be in agreement that I should set aside the tribunal's decision on that basis and remit for a complete rehearing. If I am going too far in saying that the claimant's representative agrees with that course of action it is certainly the case that, in the face of the clear suggestion emanating from Mr Whitaker, he has not sought to oppose it. So, I shall address the tribunal's treatment of mobility activity 1 first of all. However, notwithstanding that I have been able to dispose of the appeal on that basis, I have gone on to consider the various arguments raised with respect to daily living activity 8. That is because it seems to me that if I say nothing, those arguments will very probably have to be considered by the tribunal rehearing the appeal anyway and since they have been canvassed before me it is appropriate that I should deal with them so that the tribunal will know how to approach matters.

8. As to mobility activity 1, the claimant's representative had completed form PIP 2 (a claimant questionnaire) in draft form using capital letters only and the claimant had then made some written amendments prior to signing it. What was said about venturing out of doors was that she was not unable to do so as a consequence of severe anxiety or distress but that she would sometimes become anxious when outside. It appears that, the form having been completed and sent, she then attended a "face-to-face consultation" with a health professional on 26 May 2016. But I am not actually sure about that. There is certainly a report of that date. But I have looked in vain for any indication as to how the two had managed to communicate with each other. Further, what is said in the report does not actually make it clear that any information other than what is contained in the paperwork was received from the claimant. It is not said that the assessment was a paper-based one but I am left to wonder if it might have been. The matter does not appear to have been clarified by the claimant's representative or the Secretary of State at any point (unless I have missed it), nor does the matter appear to have been explored by the tribunal according to my reading of its commendably legible record of proceedings. Be all of that as it may, a view was expressed in the report that the claimant was able to plan and follow the route of a journey unaided. It is apparent from that record of proceedings that the tribunal asked the claimant and she gave evidence about journeys which she would in fact undertake. Those mentioned all appear to be ones which would be familiar to her. Further, the tribunal's actual findings appeared to relate to an ability to follow the route of familiar journeys only.

9. In his submission to the Upper Tribunal Mr Whitaker argues that the tribunal did not make any clear findings as to the claimant's ability to follow the route of an unfamiliar journey. He points out that the only unfamiliar journey specifically referred to by the tribunal was that which she had made from her home to the hearing centre where the appeal was heard. He adds that her father had driven her to the venue (see paragraph 22 (p) of the tribunal's statement of reasons) despite her being able to drive and that according to evidence recorded in the record of proceedings, she had found it necessary to do a reconnaissance visit some two weeks prior to the hearing in the company of her father. Further, persisted Mr Whitaker, the tribunal had not followed the approach set out in *MH v SSWP (PIP)* [2016] UKUT 531 (AAC) in that it had not appreciated that mobility descriptors 1d and 1f are not only concerned with navigational ability but also with the ability of a claimant to "make one's way" along a route.

10. I have concluded, bearing in mind Mr Whitaker's significantly conciliatory stance that the tribunal did not sufficiently enquire into the claimant's ability to follow the route of an unfamiliar journey and did not, in consequence, make sufficient findings about it. Since that is a material error in the sense that it could have impacted upon the outcome, I have decided to set aside the tribunal's decision on that basis as I am urged to do.

11. I now arrive at daily living activity 8. The activity and descriptors are as follows:

Column 1 **Activity**	**Column 2** **Descriptors**	**Column 3** **Points**
8. Reading and understanding signs, symbols and words.	**a. Can read and understand basic and complex written information either unaided or using spectacles or contact lenses**	**0**
	b. Needs to use an aid or appliance, other than spectacles or contact lenses, to be able to read or understand either basic or complex written information.	**2**
	c. Needs prompting to be able to read or understand complex written information	**2**
	d. Needs prompting to be able to read or understand basic written	**4**

	information	
	e. Cannot read or understand signs or symbols or words at all.	**8**

12. There are also some relevant definitions which appear within Schedule 1 Part 1 of the Social Security (Personal Independence Payment) Regulations 2013. Those are as follows:

> "Basic written information" means signs, symbols and dates written or printed standard size text in C's native language;…
>
> "Complex written information" means more than one sentence of written or printed standard size text in C's native language;…
>
> "Prompting" means reminding, encouraging or explaining by another person;…'

13. To repeat, the claimant's argument is this: she is profoundly and pre-lingually deaf. She communicates primarily by way of BSL. BSL is a language. In the circumstances it is her native language (the term "native language" is used in the definitions of both basic written information and complex written information as set out above). BSL is a language without a written component. So it is impossible for her to be able to read complex or basic written information in her native language. Therefore (as I understand it) she necessarily scores 8 points under descriptor 8e or I suppose as a fall back argument, (since there is no "native language" requirement attached to descriptor 8e), 4 points under 8d.

14. The evidence before the tribunal was that the claimant was able to read and write in the English language (she had been able to read what her representative had said in the draft PIP 2 and had been able to write in her own additions). She had been able to undertake a book keeping course at college (it is not said she failed the course). She had held down jobs involving filing, computer work and dealing with postal items and timesheets. It does not appear to have been seriously argued before the tribunal that she was unable to read or understand either basic written information or complex written information in English and indeed, on the face of it, any such argument would have been entirely unsustainable. But I note that it was said in Form PIP 2 that because she uses BSL "English is not her first language".

15. It is perhaps worth mentioning, at this stage, that illiteracy, of itself is not a relevant consideration unless it is a consequence of a claimant's mental or physical condition. That is because of the content of sections 78(1)(a) and 79(1)(b) which require any relevant limitation a claimant has to be a consequence of that claimant's "physical or mental condition". Such was explained in *SSWP v IV (PIP)* [2016] UKUT 420 (AAC) and *KP v SSWP (PIP)* [2017] UKUT 30 (AAC). It might also be worth pointing out that the prompting envisaged in descriptors 9c and 9d can be in connection with either the ability to read or to understand the relevant written

information. So, for one of those descriptors to be satisfied and for a claimant to score points, it would not be necessary, because of the use of the word "or", for the prompting to be needed to help a claimant both read and understand the written material.

16. In granting permission to appeal the District Tribunal Judge, as noted, posed the question whether BSL could be regarded as a language at all or whether it was simply "a form of communication", with the native language being English. Mr Whitaker does not argue that BSL is not a language and I am satisfied that it is. It is a method of visual expression or communication in a structured and organised way. The lack of a written component does not mean it is not a language.

17. The claimant's obvious difficulty, one which is foreshadowed above, is that if I am to regard BSL as being her native language for the purpose of entitlement to PIP, its not having a written component means that no prompting or indeed no use of an aid or appliance could possibly assist her in being able to read or understand written material in that language. Points are scored under descriptors 8b,c or d if the use of an aid or appliance or prompting leads to a claimant <u>being able</u> to read or understand the relevant material. That follows logically from the wording of those descriptors. So, since nothing of that sort could help her to read or understand written material in BSL (because there isn't any) it becomes impossible for her to satisfy the requirements.

18. As to the possibility of the claimant scoring 8 points under 8e, the wording of that descriptor does not include any reference to either complex written information or basic written information and so does not involve the above definitions and, in consequence, does not contain any native language requirement. Since the evidence appeared to be overwhelmingly to the effect that she can read and can understand signs and symbols and can read words in the English language, it is difficult to see how that descriptor can have any application at all in the context of this appeal even if English is not to be regarded as her native language or one of her native languages.

19. The above analysis does, potentially at least, create difficulties for at least some persons who use BSL if BSL, rather than in this case English, is to be regarded as the native or the only native language. I agree with Mr Whitaker when he says that such an approach would have the effect, in general terms, of BSL users who communicate predominantly in that language not being able to score under descriptors 8b, 8c or 8d. But Mr Whitaker does not argue for that result and asserts that such could not have been the intention of the Secretary of State. His proffered solution is that the term "native language" should be read as or understood as meaning "native written language". He goes on to say that the relevant written language would be the primary written language that the particular claimant in his or her circumstances would have been expected to learn. As he says, in the instant case, that would clearly be English. He adds that if such an approach is followed generally "BSL users are treated just the same as any other person with a reading impairment". In other words, BSL users are not disadvantaged. That certainly does seem to me to be a route to achieving what might be regarded as a sensible result.

But I wonder whether it is even necessary, at least in the context of this case and its circumstances, to go that far.

20. It might be thought that the language used in the above descriptors and definitions envisage a claimant only having a single native language. But I do not see why, in appropriate circumstances, it cannot properly be concluded that a claimant has more than one native language. There are many countries where a number of different languages are spoken and a person might if born in such a country be exposed, to broadly the same extent, to two or more such languages when growing up. If so it would make sense to conclude that such a person has more than one native language. In this case this claimant, the evidence would seem to suggest, has grown up being exposed to BSL (through necessity) but also to the English language. According to the evidence and the tribunal's findings she is able to communicate in both. Against that background it seems to me to make little sense to feel compelled to select one or the other as being the native language and I do not think there is anything in the wording of the legislation which actually requires that. So, if the evidence permits it, it will be open to a tribunal to regard a person as having two or perhaps even more, native languages. In a situation such as this one it will, depending on the facts, be open to a tribunal to conclude that a claimant has the native languages of both BSL and English. If there are two native languages and only one of them has a written component then the tribunal will have to assess the ability to read or understand complex written information and/ or basic written information in that language. In the context of this appeal then, the tribunal's task will be to evaluate the claimant's abilities to read or understand to the requisite standards in English. I do not need to say any more than that in giving guidance to the tribunal which will have to deal with this case by way of a rehearing.

21. I would though wish to make some further albeit brief and strictly obiter observations. Firstly, I have come across the argument (but not in this case) that even profound pre-lingual deafness cannot be considered to be a "physical or mental condition" which is capable of preventing a person learning to read. It is, of course, not a mental condition and is properly to be characterised as a physical one. But it seems to me that it may well be a factor capable of restricting or inhibiting a claimant's ability to learn so, depending on the circumstances, it may have an adverse impact upon an ability to read or understand. Secondly, whilst Mr Whitaker's approach is attractive and pragmatic it may not, of itself, offer an answer in all cases. There are spoken languages without a written component and if a person has only ever been properly exposed to such a language there may not be an appropriate written language which he/she could have been expected to learn. Perhaps in such cases, a hypothetical evaluation might have to be carried out testing an ability to read or understand, given the particular impairment, a hypothetical written language.

22. As indicated the claimant's representative also raised arguments concerning the tribunal's treatment of activity 9. But given that I have decided to set aside the tribunal's decision anyway, whatever I am to make of those arguments will not now affect the outcome. Nor is it necessary for me to give any guidance to the tribunal rehearing the appeal as to how it should approach the activity 9 issues.

23. At the rehearing the tribunal should follow the directions I have given. The rehearing will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)
M R Hemingway
Judge of the Upper Tribunal
Dated **21 March 2018**