**IN THE UPPER TRIBUNAL** **Case No.** CPIP/1251/2017
**ADMINISTRATIVE APPEALS CHAMBER**

**Before Upper Tribunal Judge Rowland**

**Decision:** The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 1 February 2017 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.

## REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 1 February 2017 whereby it dismissed the claimant's appeal against a decision of the Secretary of State dated 4 September 2016 to the effect that the claimant's award of the higher rate of the mobility component and the highest rate of the care component came to an end on 4 October 2016 and she was entitled only to the standard rate of both components of personal independence payment from 5 October 2016 on the basis that she scored 8 points in respect of daily living activities (descriptors 1(b), 4(b), 5(b) and 6(b)) and 10 points in respect of the mobility activities (descriptor 2(d)). The Secretary of State's representative, Ms Powell, supports this appeal. I agree that the First-tier Tribunal erred in law.

2. The first two grounds on which the appeal is supported are ones that arise because the First-tier Tribunal decided the case before it on the papers, rather than at a hearing. Neither the claimant nor I, when giving permission to appeal, raised these issues but I consider that they have merit.

3. The claimant ticked a box on her notice of appeal to state that she wanted her appeal decided on the papers. The alternative offered was to "attend a hearing". However, Ms Powell points out that, in her grounds of appeal on the same document, the claimant said –

> "I would prefer to attend the hearing but beg your pardon as my condition may not allow me to keep any appointment due to its unpredictability."

Ms Powell refers to *LO v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 10 (AAC); [2016] AACR 31 and submits that the First-tier Tribunal should have considered whether the claimant's participation in the proceedings could be facilitated by a telephone hearing.

4. A telephone hearing is a "hearing" for the purposes of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) because rule 1(3) provides –

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

Rule 27(1) provides –

> "**27.**—(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
>
> (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
>
> (b) the Tribunal considers that it is able to decide the matter without a hearing."

5. It would be wholly unsatisfactory if a claimant's only opportunity to ask for a hearing was when submitting a notice of appeal because at that stage many claimants are not fully aware of the case against them. This is particularly so in cases where the Secretary of State's decision is based on a medical opinion provided by a doctor or health care professional obtained as part of the process of determining entitlement, since the claimant will not usually have seen that report before submitting the appeal and will do so only when the response to the appeal is provided. Since rule 21(5) of the 2008 Rules applies only to asylum support cases, the Rules do not specify when a claimant should be asked whether he or she would consent to a social security case being decided without a hearing. The practice, as revealed in this case, is that the claimant is first asked the question in the standard (non-statutory) form for giving notice of appeal and is then given an opportunity to change the answer after he or she has seen the response to the appeal.

6. Thus, in this case, the claimant was sent by the First-tier Tribunal on 18 November 2016 a standard letter, which included the following instruction and information –

> "If you wish to continue with your appeal, please check the information that we hold about your hearing preferences. If the information we hold is incorrect, please inform us as soon as possible. If the information we hold for you is correct, you do not have to contact us.
>
> **About the Hearing**
>
> Your appeal will proceed as a **Paper** hearing. A paper hearing is when you or any other party has no objection to the appeal being decided, on these papers by the Tribunal without you or any other party being present. Please note that all parties must agree to a paper hearing taking place**. It is important that if you now wish to have an ORAL hearing (this is when you would like to have a hearing where you and/or your representative, if you have one, can meet the Tribunal to put your case forward), that you inform the tribunal, within 14 days of this letter, in writing.**
>
> We are currently dealing with a high volume of appeals and are working hard to reduce the length of time you will have to wait before hearing from us with a decision on your appeal. We will not be writing to you with a hearing date if you have opted for a paper hearing of your appeal.
>
> **It is important that you send us any further evidence that you wish the Tribunal to consider as soon as possible. This evidence will be shared with the other party.**"

This document is not in the bundle before the Upper Tribunal – it is the First-tier Tribunal's case-management system – and so Ms Powell was probably unaware of it although she may have been aware of the general practice. She will also have been unaware that on 7 December 2016, the claimant confirmed in a telephone conversation with a clerk to the First-tier Tribunal that she wanted a paper hearing.

7. However, these contacts do not seem to me to undermine Ms Powell's argument. Neither the standard form for giving notice to appeal, which is expressed in terms of *attending* an appeal, nor the standard letter sent later, which is expressed in terms of a hearing where the claimant "can *meet*" the Tribunal, admits to the possibility of a telephone hearing in which a claimant might participate from home. There may possibly be good reasons for that. A telephone hearing may be adequate for case management or when considering a point of law but it is much less useful than a face-to-face hearing in cases where facts are in dispute or an assessment of disability, or of the effects of disability, is required. That is because non-verbal communication is lost. On the other hand, a telephone hearing may be better than no hearing at all in such cases and the wording of the standard form and letter means that, in considering whether the condition of rule 27(1)(a) is satisfied, the First-tier Tribunal may need to ask itself whether consent or a lack of objection may have been based on a lack of information about the possible options, particularly where there is reason to suppose that the claimant might have wanted a telephone hearing. This is such a case and I accept that the First-tier Tribunal ought in the circumstances to have expressly considered whether a telephone hearing would have been desirable.

8. This is particularly so in the light of the points made by Ms Powell in her second ground for supporting the appeal, in which she argues that further exploration of the claimant's evidence was required. Thus, she points out that the claimant told the health care professional that she did she did not cook at all, apparently because not only standing but also using a perching stool caused back and leg pain, and yet the health care professional said that she cook using an aid or appliance, without referring to that evidence. She also points out that there appears to have been an inconsistency between, on one hand, the social and occupational history recorded by the health care professional in her report and, on the other hand, the functional history recorded in the same document.

9. In her third argument, Ms Powell supports the appeal on a ground that it is related to one that I raised when giving permission to appeal. She submits that, in the circumstances of this case, saying that "irrespective of her pain she was functioning at a good level" was not sufficient to show that it had adequately considered whether the claimant could carry out descriptors to an acceptable standard. I accept that submission.

10. Ms Powell did not make a submission on the question whether there was any unfairness or illegality arising from the Secretary of State's failure to explain the scoring system for personal independence payment in his submission to the First-tier Tribunal. I do not consider that I need add anything to what I have said on that issue in *LH v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 57 (AAC) (the

case on file CPIP/1261/2017 to which I referred when giving permission to appeal in the present case).

11. Understandably, the claimant herself has provided new evidence and raised issues of fact rather than issues of law. Since an appeal to the Upper Tribunal lies only on a point of law and I agree with Ms Powell that the issues of fact would be better determined by the First-tier Tribunal than by me, I need not comment on the further evidence. Instead, I remit the case to the First-tier Tribunal.

**Mark Rowland**
**4 April 2018**