

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

As the decision of the First-tier Tribunal (made on 31 July 2017 at Nottingham under reference SC319/17/00129) involved the making of an error in point 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.
- B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 11 August 2016 and decided on 12 October 2016 from the effective date of 16 November 2016.
- D. 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. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. Both the claimant and the Secretary of State have expressed the view that the decision of the tribunal involved the making of an error in point of law and agreed to a rehearing. That makes it unnecessary to set out the history of the case or to analyse the whole of the evidence or arguments in detail. I need only deal with the reason why I am setting aside the tribunal's decision.

A. Why I have set the First-tier Tribunal's decision aside

2. The claimant had just turned 16 at the date of her claim. She is profoundly deaf and wears cochlear implants. The Secretary of State refused her claim for a personal independence payment, with the result that her award of disability living allowance duly came to an end. She exercised her right of appeal to the First-tier Tribunal. The tribunal increased the claimant's score for daily living component activity 7 (communicating verbally), but the points were not sufficient to allow an award. By its award, the tribunal found that the claimant needed communication support to be able to express or understand complex verbal information.

3. The tribunal took account of the claimant's ability to lip read, saying: 'the claimant uses her implants during her waking hours when she would be able to

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understand basic information, using her lip-reading skills as necessary.' Lip reading is undoubtedly useful, but it is not reliable, as Upper Tribunal Judge Gray noted in *EG v Secretary of State for Work and Pensions* [2017] UKUT 101 (AAC). She did not accept the argument of the Secretary of State's counsel that lip reading should be disregarded. Despite that, the Secretary of State's position has not changed. As the Secretary of State's representative has submitted in supporting the appeal:

'It is the Secretary of State's position that lip reading is not considered an acceptable way to interpret verbal communication, particularly when one takes into consideration regulation 4(2[A]) of the Social Security (Personal Independence Payment) Regulations 2013.'

It seems to me that it is pointless to disagree with a Secretary of State who wishes to implement legislation in a way that is perhaps more generous to claimants than the legislation strictly allows. I therefore set aside the tribunal's decision for taking lip reading into account and direct the tribunal at the rehearing to take the same approach as the Secretary of State.

4. There is a further error of law in that the tribunal's reasoning appears to be contradictory in that it found that implants were less effective in a noisy environment, but then did not follow this through under regulation 4(2A).

5. I do not need to deal with any other error in point of law that the tribunal may have made. Any that were made will be subsumed by the rehearing.

B. What will happen at the rehearing

6. For the benefit of the claimant, this is the effect of the decision in *KK* to which I have referred in my directions.

7. The tribunal must follow the directions I have given.

8. Unless and to the extent that I have directed otherwise, 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.

9. The tribunal will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of the relevant evidence and submissions made at the rehearing.

10. The tribunal must come to its own conclusions on issues of both fact and law that it considers. Neither my decision itself nor anything I have written in my reasons for decision is an indication of the likely outcome of the rehearing. Nor will the tribunal be bound by any conclusions of fact or law reached by the tribunal in the decision that I have set aside.

**Signed on original
on 06 April 2018**

**Edward Jacobs
Upper Tribunal Judge**