IN THE UPPER TRIBUNAL **Case No.** CDLA/1227/2018
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made on 10 January 2018 at Bristol under reference SC186/17/02942) involved the making of an error of law it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing before a differently constituted tribunal panel.

This decision is made under section 12 of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS FOR THE REHEARING:

A. The tribunal must (by way of an oral hearing) 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 SSWP (DLA)* [2015] UKUT 417 (AAC).

C. The tribunal must not take account of circumstances that were not obtaining at the date of the Secretary of State's original decision under appeal (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 appointee, through her representative, and the Secretary of State, through hers, have expressed the view that the decision of the First-tier Tribunal (the tribunal) involved the making of an error of law. Indeed, they have done so twice now, given that I initially doubted that either of them were correct and, as a consequence, required two sets of submissions from each of them. The Secretary of State has urged me to set aside the tribunal's decision and to remit for a complete rehearing before a differently constituted tribunal panel. The appointee has not raised any objection to that proposed course of action. The continuing level of agreement that there is between the parties makes it unnecessary for me to set out the history of the case or to analyse the whole of the evidence or the arguments in detail. I need only deal with the reason why I am setting aside the tribunal's decision.

2. Although I do not think matters are quite as clear cut as do the respective representatives, I have decided that there is a lack of clarity in the tribunal's findings such as to render unsafe its conclusion to the effect that there is no entitlement to the highest rate of the care component of disability living allowance (DLA) with respect to the child claimant. Since the middle rate of the care component had been awarded by the Secretary of State and since the appropriateness of that award was not in issue, the tribunal rightly focused upon night-time concerns. In doing so it accepted that there would be periods, which might last for a week or a fortnight, during which the child claimant would normally stay awake at night.

But it did not make any finding with more specificity than that as to how often such weekly or fortnightly periods might occur. True it did say that, broadly speaking, it was satisfied that the night-time need requirements were not met but I have concluded that it was required to give a less vague indication as to the frequency with which the periods of weekly or fortnightly difficulty it had identified would be manifested. I am not suggesting it had to be absolutely specific so as to enable a precise arithmetical calculation to be made or that it was obliged to somehow try to reach findings of greater specificity that the evidence could sensibly bear. However, what it said did not really give any indication at all as to the frequency. Further, it also found that on some nights the child claimant would wake up with what it described as "a heavy nappy" during the night. It decided that this would happen on "a couple of occasions a week". But it did not, on my reading, make any findings as to how long the appointee would be detained attending to the child claimant or whether, after dealing with the need to change the nappy, any further attention was required to once again get him back to sleep. That was relevant because there was evidence of difficulty in getting him to go to sleep in the first place. So, even if for only two nights per week, such difficulties might have been relevant to the overall picture depending on the frequency of the weekly or fortnightly periods referred to above. Whilst the situation is perhaps quite marginal I have concluded that the tribunal did not make sufficient findings, or at least sufficient clear ones, such that it did err in law.

3. I do not now need to deal with any other errors of law that the tribunal may have made. Any such errors that there might have been will be subsumed by the rehearing which will now follow. However, I have decided it is appropriate for me to offer some comments upon one of the points which the claimant's representative has raised. But what follows is, strictly speaking, obiter dicta or, for those who prefer the English, not essential to the decision and therefore, not legally binding as precedent.

4. According to the tribunal's findings, the relevant household consists of the appointee, the claimant and the claimant's seven year old sister. Given that the Secretary of State's decision-maker had awarded the middle rate of the care component on the basis of daytime conditions, an issue was raised as to when it was that the household would close down for the night. That was a potentially important aspect of the appeal because in order to succeed the appointee was required to demonstrate that the child claimant would require either prolonged or repeated attention or would require another person to be awake for a prolonged period or at frequent intervals to watch over him during the night (the full test is set out at section 72(1)(c) of the Social Security Contributions and Benefits Act 1992). The tribunal had found that the appointee would, initially, attempt to relax the child claimant prior to putting him to bed (paragraph 6 of the statement of reasons), would not then simply leave him to go to sleep but would lay in bed with him until he did go to sleep (paragraph 7 of the statement of reasons), would then get out of the bed and "do some tidying up" (paragraph 7 again) and would then (on my reading) retire to bed herself between 10.00 pm and 10.30 pm unless there had been difficulties in getting the child claimant to sleep, in which case she would retire to bed at 11.00 pm or 11.30 pm (paragraph 5 of the statement of reasons).

5. In *R v The National Insurance Commissioner ex parte Secretary of State for Social Services* [1974] 1 WLR 1290, the word "night" as used as part of the statutory test for DLA was defined as being:

> "That period of inactivity or that principal period of inactivity through which each household goes in the dark hours and to measure the beginning of the night from the time at which the household as it were, closed down for the night."

6. In volume 1 of "Social Security Legislation 2018/19 Non-Means Tested Benefits and Employment and Support Allowance" published by Sweet and Maxwell, there is this, to my mind, insightful observation:

> "While this definition seems to address itself to the habits of the particular household there should be room to take account of the more objective, typical household. Thus, if one (possibly the only other) member of the household remains up late to undertake what is a regular attention need that should be regarded as a night-time need because otherwise the household would, as a whole, have been retired to bed. Conversely, when children have gone to bed, but their parents have not, any attention prior to the parents normal bedtime will be attention by day, and any attention to the child before the parents usual time of rising will be attention at night. The first part of this approach was confirmed in *R(A) 1/78* (rejecting another part of Lord Widgery's judgment in the case above)."

7. For the avoidance of doubt, "the case above" is *R v National Insurance Commissioner ex parte Secretary of State for Social Services.*

8. The claimant's representative, in his second submission, raised this issue and referred to the decision of Commissioner Henty in *CDLA/997/2003*. In that case, the mother of a child claimant had to rise regularly, at 5.00 am each morning, because that was when the child claimant would wake up and his supervision needs would commence. But the evidence was that, otherwise, she would not have risen until 7.00 am. So, it was accepted that the supervision between those hours would count as being given at night. That decision is perhaps somewhat dated now but the passage of time has left the force of its logic undiminished.

9. Translating all of that to this case, it does seem to me that when it rehears the appeal the tribunal will have to consider whether there are at least some nights when the appointee has to remain awake later than she would otherwise do as a result of the child claimant's needs which arise when he is being helped to get to sleep. I have in mind the lying down with the child and any other activity which may accompany that. If it is concluded that the appointee does stay awake later than she would normally do, that on those nights the household would otherwise have closed down earlier, and that during the time between the normal closing down of the household and the actual closing down there is a need for watching over or prolonged or repeated attention then it will be open to the tribunal to conclude that any such activity is to be taken into account when evaluating the extent of the child claimant's night-time needs. I do not think I am saying anything at all which is new here but rather, I am simply restating what was said in *CDLA/997/2003* and agreeing with the words I have quoted from the above well known publication.

10. There will then, given what I have decided, be a rehearing of the appeal. 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.

11. 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 27 December 2018