DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the London Hatton Cross First-tier Tribunal dated 25 April 2018 under file reference SC154/17/05852 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 14 August 2017 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member who previously considered this appeal on 25 April 2018.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely 14 August 2017).

(4) If the Appellant has any further written evidence to put before the tribunal, especially medical evidence, this should be sent to the HMCTS regional tribunal office in Sutton within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> by the Secretary of State under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary and what happens next

1. I allow the Appellant's appeal to the Upper Tribunal. The First-tier Tribunal's decision involves an error on a point of law. I therefore set aside the tribunal's decision.

2. The case must be reheard by a new First-tier Tribunal (or "FTT"). I cannot predict the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new FTT will succeed *on the facts*. So, the new tribunal may reach the same, or a different, decision to that of the previous tribunal. It all depends on the findings of fact that the new FTT makes.

The background to the appeal to the First-tier Tribunal

3. On 14 August 2017 a DWP decision maker made an award on the Appellant's personal independence payment (PIP) claim. She concluded the Appellant qualified for the standard rate of the daily living component for the period from 26 April 2017 to 6 August 2020 (scoring 8 points for daily living) but to no award of the mobility component (scoring 4 points for mobility). That award was unchanged on mandatory reconsideration.

The First-tier Tribunal hearing and decision

4. The FTT, which held an oral hearing on 25 April 2018, in substance refused the Appellant's appeal. In doing so the FTT raised the daily living score to 10 points, which was not enough to change the rate of the award of that component, and confirmed the mobility score at 4 points.

5. According to the FTT's record of proceedings, the hearing lasted from 11.00 a.m. to 11.33 a.m. Despite lasting for half an hour, relatively little evidence is recorded in terms of the FTT's questioning about PIP activities and descriptors and the Appellant's answers. I have identified at most 9 or 10 questions and corresponding answers. Only one of those questions directly related to mobility issues. However, the record of proceedings also includes the following entries at various junctures:

> "NB App did not make any eye contact with panel members on entering."
> …
> "NB App was informed that she could take a break whenever she wanted, and to have a drink of water if that would make her feel more comfortable."
> …
> "NB App was asked whether she wanted to continue with the hearing or to stop so that she could bring a friend or try to get a representative. App said wanted to carry on with the hearing."
> … [*after one question later*]
> "App was experiencing difficulties in absorbing information and the Tribunal members were concerned that she was not absorbing the questions. The App said her mind was wandering and she did seem genuinely distressed. The Tribunal informed the App that it didn't wish to prolong the hearing. She would not be asked any more questions and the Tribunal would seek to make a decision based on the information that it had. The Tribunal would also try to arrange transport home for the App."

6. The clerk's note in the FTT's case records then states "arranged cab instructed by panel members as she wasn't well enough to carry on with hearing, appellant had no money to get home, arranged with Addison Lee."

The proceedings before the Upper Tribunal

7. The Appellant subsequently gained help from Ealing Law Centre, which lodged detailed grounds of appeal on her behalf, focussing both on what happened at the hearing and the FTT's approach to certain of the descriptors in issue. When giving permission to appeal, I commented as follows:

> "1. The grounds of appeal, as set out by the Appellant's representative, are reasonably arguable, and especially points (3) and (7). Can it really be said in these circumstances that the Appellant got a fair hearing, given the account given in the record of proceedings? See further *AM v SSWP (ESA)* [2013] UKUT 563 (AAC). I also accept that points (4)-(6) and (8) & (9) are arguable.
>
> 2. The Secretary of State's representative (Mrs F Gigg) made the following submission in *AM v SSWP (ESA)* (at para 9), a submission which arguably applies to the present case as well:
>
> > "I agree with the Upper Tribunal Judge's suggestion that the tribunal should have recorded that they expressly considered an adjournment when the claimant left the hearing. They may have felt that they had sufficient evidence before them to continue without the claimant, but the fact is that the claimant had requested an oral hearing and had therefore clearly wished to participate in the proceedings. According to Rule 2 of the First-tier Tribunal Rules, the tribunal's overall objective to deal with the case fairly and justly included a duty to ensure that the claimant was able to participate fully in the proceedings. In my view the tribunal at least needed to *consider* whether their overriding duty had been met in the circumstances or whether they should adjourn. Their failure to show in either the record of proceedings or statement of reasons that they considered the matter is, in my opinion, an error of law."

8. Mrs W. Barnes, who now acts for the Secretary of State in these proceedings, supports the Appellant's appeal to the Upper Tribunal, and essentially for the same reasons as the appeal in *AM v SSWP (ESA)* was supported. She points out that there is no indication in the record of proceedings or statement of reasons (or indeed in the decision notice) that the FTT considered adjourning. There is no mention of the overriding objective.

9. I do not doubt the FTT was being solicitous and considerate for the Appellant's welfare. It may well have come to the view that it had enough material in the appeal bundle. However, there was no clear justification given by the FTT for proceeding with what was effectively an abortive hearing. The facts of this case are not as extreme as in *AM v SSWP (ESA)* (where the claimant left the hearing after 10 minutes owing to severe sickness) but it falls into the same territory.

10. I am accordingly satisfied that the FTT erred in law for the reason given above. In the circumstances I do not need to address the Appellant's other grounds of appeal. I therefore allow the appeal, set aside the FTT's decision and remit the original appeal for re-hearing before a new tribunal.

What happens next: the new First-tier Tribunal

11. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no

finding, nor indeed expressing any view, on whether the Appellant is entitled to PIP (and, if so, which component(s) and at what rate(s) and for what period). That is all a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact accordingly. It may well be that the applicability of certain descriptors may not now be challenged, given the history of this appeal, allowing the next FTT to focus on the issues which are really in dispute.

12. The new FTT will have to focus on the Appellant's circumstances as they were as long ago as August 2017, and not the position as at the date of the new FTT hearing, which will obviously be more than 18 months later. This is because the new FTT must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The decision by the Secretary of State which was appealed against to the FTT was taken on 14 August 2017.

Conclusion

13. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 30 January 2019

Nicholas Wikeley
Judge of the Upper Tribunal