

IN THE UPPER TRIBUNAL

Reference No: ENF/1494/2019

ADMINISTRATIVE APPEALS CHAMBER

IN THE MATTER OF A REFERENCE BY THE FIRST-TIER TRIBUNAL UNDER RULE 7(3) OF THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (SOCIAL ENTITLEMENT CHAMBER) RULES 2008

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal makes no decision on the reference.

REASONS FOR DECISION

1. The Upper Tribunal has before it what purports to be a reference by the First-tier Tribunal under rule 7(3) of its procedure rules. The reference was made by the First-tier Tribunal on 14 September 2018 in a directions notice of that date made by District Tribunal Judge Durance of the First-tier Tribunal. I set out the terms of those directions below but first need to explain a little of the history to give them context.
2. The reference arises following a decision I made on an appeal to the Upper Tribunal by the claimant. That appeal was successful. My decision allowing the appeal was made on 2 July 2018 and issued to the parties to the appeal and the First-tier Tribunal on 6 July 2018. My decision set aside the decision of the First-tier Tribunal of 29 August 2017 and remitted the first instance appeal (against the Secretary of State's decision of 21 March 2017) to be decided entirely afresh by a completely differently constituted First-tier Tribunal. Those aspects of my decision were made under section 12(2)(a), 12(2)(b)(i) and 12(3)(a)

of the Tribunals, Courts and Enforcement Act 2007. I also directed the Secretary of State, under section 12(3)(b) of the same Act, as follows:

“Within one month of the date of issue of this decision the Secretary of State must provide the new First-tier Tribunal with an accurate written summary of the history of the appellant’s awards of ESA, which should include the periods of the awards and the levels at which they were awarded (i.e. with the work-related activity component or the support group component)”.

3. That last Upper Tribunal direction was not met by the Secretary of State by the ‘within one period’ of 6 August 2018. This failure was addressed by DTJ Durance in directions he made dated 14 September 2018. Those directions said:

“(1) The DWP are in breach of the order made by UTJ Stewart Wright of 2 July 2018.

(2) The DWP are also in breach of the order made by DTJ Durance dated 23 July 2018.

(3) This situation arises frequently, i.e. on set aside the DWP fail to comply with UKUT directions.

(4) Refer the matter back to UTJ Stewart Wright for actions, as technically his direction has been initially breached and he has powers of committal.”

4. The 23 July 2018 directions of DTJ Durance had required the respondent:

“to comply with paragraphs 5 + 8 of UTJ Stewart – Wright’s decision. They were given 1 month from 2 July 2018 by UTJ Wright. Time is extended by me to 15 August 2018”.

5. It is not entirely clear what then happened with this ‘reference’ from the First-tier Tribunal to the Upper Tribunal. It appears that the First-tier Tribunal’s file may have been sent to the Upper Tribunal on or about 21 September 2018 with the above directions of DTJ Durance attached to the front of that file with a cover note simply stating “FAO: UTJ STEWART WRIGHT – Please see attached decision by Tribunal Judge Durance”. The date of ‘21/9/18’ was written next to these cover ‘instructions’. However, the ‘date received’ stamp showing when this

First-tier Tribunal file was received at the Upper Tribunal (AAC)'s office gives a date of 12 June 2019. By this point in time the Upper Tribunal's office had long since ceased to hold any Upper Tribunal file on this case, the appeal having been decided nearly a year earlier.

6. It appears from later documents that the catalyst for the Upper Tribunal looking into this matter was a letter from the First-tier Tribunal to the UT(AAC)'s office of 7 May 2019. This letter enclosed a letter from the claimant in which he enquired, not unreasonably, what was happening with his appeal. The First-tier Tribunal's letter of 7 May 2019 said that its file had been sent to the Upper Tribunal on 21 September 2018. The Upper Tribunal's office replied to this letter on 9 May 2019 by saying that the appeal had been remitted back to the First-tier Tribunal on 6 July 2018 for a new hearing. It appears therefore that at this stage the Upper Tribunal (AAC)'s office was not aware of the reference or even that it had the First-tier Tribunal's file. That may have been because of the informal manner in which the reference had been made, as described in paragraph five above. However, the First-tier Tribunal's office further replied to the Upper Tribunal on 3 June 2019 in which letter it made it clear that the reason its file had been sent to the Upper Tribunal was because of DTJ Durance's directions of 14 September 2018.

7. The power of the First-tier Tribunal to make a reference to the Upper Tribunal is found in rule 7(3) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the FtT Rules"). It needs to be read with rule 16 of the same rules. Those rules provide as follows:

“7.— (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—

- (a) waiving the requirement;
- (b) requiring the failure to be remedied;
- (c) exercising its power under rule 8 (striking out a party's case); or
- (d) exercising its power under paragraph (3).

(3) The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its power under section 25 of the 2007 Act in relation to, any failure by a person to comply with a requirement imposed by the Tribunal—

- (a) to attend at any place for the purpose of giving evidence;
- (b) otherwise to make themselves available to give evidence;
- (c) to swear an oath in connection with the giving of evidence;
- (d) to give evidence as a witness;
- (e) to produce a document; or
- (f) to facilitate the inspection of a document or any other thing (including any premises).

16.—(1) On the application of a party or on its own initiative, the Tribunal may—

- (a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation; or
- (b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

(2) A summons or citation under paragraph (1)(a) must—

- (a) give the person required to attend 14 days' notice of the hearing or such shorter period as the Tribunal may direct; and
- (b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.

(3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined.

(4) A summons, citation or order under this rule must—

- (a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the summons, citation or order, if they have not had an opportunity to object to it; and
- (b) state the consequences of failure to comply with the summons, citation or order." (my underlining added for emphasis)

8. Two observations need to be made about this rule and the reference power within it. First, as the words I have underlined show, it applies only to a requirement imposed by the First-tier Tribunal. Accordingly, the Secretary of State's failure to comply with the relevant direction in my decision of 2 July 2018 does not fall within rule 7(3) of the FtT Rules. Second, insofar as a requirement was imposed by the First-tier

Tribunal in this case, it was, seemingly, under rule 7(3)(e) of the FtT Rules (production of a document). Whether that would extend to providing “an accurate written summary of the history of the appellant’s awards of ESA” may be open to question if that summary did not exist in documentary form: see *AP v HMRC (Enforcement Reference)* [2014] UKUT 182 (AAC); [2014] AACR 37.

9. However, several other issues arise about the purported reference. First, what requirement was imposed here on the Secretary of State by the First-tier Tribunal? Second, was that requirement clearly expressed? Third, were the terms of rule 16 of the FtT Rules met (particularly rule 16(4))? And fourth, did DTJ Durance have any authority to make the reference? These are all issues of importance.
10. If there was a requirement imposed by the First-tier Tribunal, it can only have arisen from DTJ Durance’s directions of 23 July 2018. As has been noted, these directed the DWP “to comply with paragraphs 5 + 8 of UTJ Stewart – Wright’s decision. They were given 1 month from 2 July 2018 by UTJ Wright. Time is extended by me to 15 August 2018”. I am doubtful that this amounts to a (separate) requirement imposed by the First-tier Tribunal as, arguably, it is only directing the DWP to comply with what the Upper Tribunal had required it to do (assuming ‘the DWP’ and the Secretary of State for Work and Pensions are one and the same, to which I return below), and so is not a separate requirement of the First-tier Tribunal. The alternative argument is that the direction made by the Upper Tribunal on 2 July 2018 had expired after 6 August 2018 and by then extending time for meeting it (if that is what the First-tier Tribunal did, again see below) until 15 August 2018 the First-tier Tribunal was imposing a fresh requirement. However, for the reasons the Secretary of State gives (as set out below), I do not accept this alternative argument.

11. However, even assuming what was set out in the 23 July 2018 directions could amount to the First-tier Tribunal imposing its own requirement, serious issues arise as to what the requirement was and on whom it was imposed, bearing in mind the need in such ‘contempt’ matters for scrupulous adherence to all procedural requirements: see *MD v SSWP (Enforcement Reference)* [2010] UKUT 202 AAC; [2011] AACR 5.
12. Taking the second issue first, in my judgment the ‘DWP’ does not constitute ‘a person’ for the purposes of rules 7(3) and 16(1)(b) of the FtT Rule. It is Government Department or Corporation which is separate from the Minister who presides over it. As for first issue - the nature of the requirement - this was expressed by the First-tier Tribunal in terms of complying with paragraphs five and eight of my decision of 2 July 2018 and was not about complying with the fifth *direction* made in that decision. I have great difficulty in identifying any requirement imposed by either paragraph 5 or paragraph 8 of the decision I made on 2 July 2018.
13. Further and in any event, I cannot see anywhere in the 23 July 2018 directions of the First-tier Tribunal where the requirements of rule 16 of the FtT Rules are met, and rule 16(4) in particular.
14. Lastly, but of equal importance, I do not consider there was any lawful authority for a District Tribunal Judge to make the reference. Under paragraphs 9 and 10 of the Practice Statement on *Composition of tribunals in social security and child support cases in the social entitlement chamber on or after August 1, 2013*, the exercise of the rule 7(3) power vests only in the Chamber President or a Regional Tribunal Judge of the Social Entitlement Chamber.
15. The Secretary of State has filed helpful submissions on this enforcement reference. These largely follow the analysis set out above, though in some more detail. I set the submissions out in full as they

may assist the First-tier Tribunal to understand its powers and obligations in rule 7(3) references.

“19. On behalf of the Secretary of State it is submitted that the decision of DTJ Durance, dated 14 September 2018 (and sent to the Upper Tribunal under cover of a note dated 21 September 2018) is not - and cannot be treated as - a lawful referral....under rule 7(3) for the reasons set out below (which largely reflect the issues raised by UTJ Wright in his Observations of 18 July 2019).

Lack of service

20. On the information available to the Secretary of State at present, it appears that the direction of DTJ Durance, dated 23 July 2018, may never have been received by the DWP. The Secretary of State and/or DWP cannot be in contempt of a direction that they did not receive.

The requirement being referred was not clear

21. It is well established as a matter of general law that an order or undertaking cannot be enforced unless its terms are clear and unambiguous (see *Iberian Trust Led v Founders Trust & Investment Co Ltd* [1932] 2 K.B. 87 at 95).

22. The direction of DTJ Durance, dated 23 July 2018, was neither of these things. It referred to compliance with paragraphs 5 and 8 of the “decision” of UTJ Wright and stated that the DWP had been given one month to comply. However, these paragraphs of UTJ Wright’s decision did not impose any clear requirements on the DWP or the Secretary of State to provide documents within one month or at all:

a. Paragraph 5 referred to the Secretary of State’s failure to put before the FTT the basis for the two previous appeals. It might be thought implicit in the reasoning that the Secretary of State would have to provide such information on remittal, but this paragraph did not impose on the Secretary of State any clear obligation to provide specific documents or submissions.

b. Paragraph 8 of the decision stated that, if the Secretary of State wished to make good a suggestion that the Job Centre Plus rather than the Work Programme was the relevant work-related activity provider, she would have to do so in a written submission, but no directions or time-limit were set for compliance with this requirement.

23. It is possible that DTJ Durance intended to refer to the Directions (and not the Decision) of UTJ Wright but this is not what was said on the face of the record (and so was not clear) and, in any event, there were only five directions, so this could not account for the reference to “paragraph 8”.

24. There is no way that the DWP could be sure of exactly what was required of it by DTJ Durance’s direction of 23 July 2018.

The requirement being referred falls outside the scope of rule 7(3) – not imposed by FTT

25. Further and in any event, whatever the precise nature of the requirements, they must (on any view) fall outside the scope of rule 7(3). The DTJ's direction of 23 July 2018 was expressly stated to be a direction extending time for compliance with requirements imposed by the Upper Tribunal. Whether the relevant requirements were those (arguably) implicit in paragraphs 5 and 8 of the Decision of UTJ Wright, or those explicit in his Direction (5), the extension of time did not amount to a requirement imposed by the FTT.

26. UTJ Wright states.....that it could be argued that the direction imposed by the Upper Tribunal had expired after 6 August 2018 and that, by extending time until 15 August 2018, the FTT was imposing a fresh requirement. However, failure to comply with a time limit does not extinguish the effect of an order. A party is still required to comply with an order of which they are in breach; an extension of time does not create any new obligations it merely permits additional time for compliance with existing ones.

The requirement being referred falls outside the scope of rule 7(3) – not a “document” in the “possession and control” of the Secretary of State

27. The relevant requirement also falls outwith rule 7(3) on the grounds that it was not (on any view) a requirement to “produce a document”.such a requirement can only be imposed under rule 16 which enables the FTT to require a person to “produce” a document in their “possession and control”.

28. The word “produce” in this context means production *to the FTT* of *existing* documents. A person cannot be in “possession” or “control” of documents that do not yet exist. A summons requiring production of documents in civil proceedings should only be granted where it can be shown that the relevant documents are “likely to exist” (see *Omar v Omar* (11 October 1996) per Peter Gibson LJ (cited in Matthews & Malek on Disclosure (5th Ed) at [10.06])) and the same must be true in the FTT.

29. It follows that the requirement for which time was extended cannot have been a requirement to produce a document within the meaning of rule 7(3). What was required (on any interpretation of DTJ Durance's direction) was creation of something new (whether in compliance with Direction (5) for a “written summary of the appellant's awards of ESA” or in compliance with the comment in paragraph 8 of the Decision concerning the need for written submissions).

30. In *AP v HMRC (Enforcement Reference)* [2014] UKUT 182 (AAC) UTJ May QC held that a failure to comply with a requirement to provide written submissions did not fall within rule 7(3). The same reasoning applies here: what was required by DTJ Durance was a form

of written submission. Alternatively, it was provision of a new document or information under rule 5, breach of which cannot be referred to the Upper Tribunal under rule 7(3) for the reasons set out above.

Failure to comply with rule 16(4)

31. Rule 7(3) is limited to failure to comply with requirements imposed under rule 16 and that rule imposes important procedural safeguards which must be scrupulously followed (as UTJ Wright observed at paragraph 10 of his Observations). An order under rule 16 must...: (a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the order; and (b) state the consequences of failure to comply with the order. Those requirements were not met in the present case.

DWP not a person

32. The direction of 23 July 2018 was also incapable of being enforced under rule 7(3) because (insofar as it could- contrary to the above- be treated as a standalone direction imposed by the FTT distinct from the earlier direction of UTJ Wright) it was a direction against the “DWP” which is not a legal person.

33. Rule 7(3) expressly refers to requirements imposed on “persons”. This term is capable of encompassing corporate entities but a department of state has no legal personality separate from the Crown: it is a fundamental constitutional doctrine that the Crown is one and indivisible (see *Town Investments Ltd v Department of the Environment* [1978] A.C. 359 at 400). Whilst civil proceedings can be brought against a named government department (pursuant to provisions made under section 17 of the Crown Proceedings Act 1947) the appropriate respondent in judicial review proceedings and appeals to the FTT in administrative matters is the Secretary of State (acting in an official capacity).

No power to make referral

34. The referral was also defective because DTJ Durance had no power to make it. The *Practice Statement on Composition of Tribunals in Social Security and Child Support Cases in the Social Entitlement Chamber on or after 1 August 2013*, at paragraph 10, makes clear that decisions under rule 7(3) must be made by the Chamber President (or a Regional Tribunal Judge exercising delegated powers under paragraph 9).

16. The serious defects and invalidities I have identified in the purported reference mean that I can make no enforcement decision on it.
17. However, the failure of the Secretary of State through her officials to provide relevant evidence in her possession to First-tier Tribunals has

exercised the Upper Tribunal to a significant degree recently. DTJ Durance raised similar concerns in an appeal that reached the Upper Tribunal in *NW v SSWP (PIP)* [2019] UKUT 150 (AAC). That appeal arose in the context of requests made by the First-tier Tribunal for DLA evidence in Personal Independence Payment conversion appeals and the ignoring of those requests by officials of the Secretary of State. The reply by the Secretary of State on that issue in *NW* seems to me to cover all failures on her part to meet obligations imposed on her by either the First-tier Tribunal or Upper Tribunal (see paragraph 17 of *NW*).

“There is certainly not an intention to ignore instructions from the First-tier Tribunal, and operational instructions have always stated that these directions must be complied with fully, including in respect of providing DLA evidence to the Tribunal. The actions of the Department in this case and those referred to by Judge Durance clearly do not meet the standards required to allow the timely and correct progress of these appeal cases and those serious concerns have been passed onto the operational officers who manage these matters.”

It seems to me that that corrective applied directly to the non-compliance with direction (5) in my decision of 2 July 2018.

18. I am also aware from separate Upper Tribunal proceedings that are before me at present (CE/2506/2018) that ESA ‘adjudication histories’ (which in essence is what I was directing the Secretary of State to provide to the First-tier Tribunal in this case) ought to have been included in appeal responses provided by the Secretary of State to the First-tier Tribunal since February 2018. This follows from the instructions given in DMG Memo 19/17, which instructions were later incorporated into the DWP Code of Appeals Procedure Guide at paragraphs 228-229 with effect from March 2018. Although the appeal response to the First-tier Tribunal in this case was written before these dates, the instructions to provide adjudication histories were in place before my direction that the same was to be provided to the First-tier Tribunal. That makes it all the more inexcusable that my direction was not implemented.

19. I should, lastly, note and welcome that these enforcement proceedings have, finally, led the Secretary of State to comply with direction (5) in my decision of 2 July 2018. As the Secretary of State has explained in her submissions of 28 October 2019:

“38. Since receipt of UTJ Wright’s Observations and Directions of 18 July 2019 every effort has been made to obtain the relevant information and comply with the original Direction (5).

39. Written submissions were sent to the FTT on 8 October 2019 and 11 October 2019, setting out a summary of the history of the appellant’s awards of ESA. A copy of these submissions is attached.

40. Direction (5) has now been complied with but this does not excuse the long delay for which the Secretary of State reiterates her apology.”

The apology reiterated above was set out earlier in the above submissions as follows:

“4.....the Secretary of State wishes to offer an unreserved apology to the tribunal and the appellant for the delay in compliance with the direction given on 2 July 2018. The concerns raised by UTJ Wright in his Observations of 18 July 2019 have been taken very seriously and attempts have been made to ascertain what went wrong in this case.

5. Records indicate that UTJ Wright’s decision of 2 July 2018 was received by DMA Leeds on 9 July 2018 and forwarded to Birkenhead Benefit Centre (where the Dispute Resolution Team, who prepared the original submission to the FTT was based at the time) on 10 July 2018, along with the appeals file. A note shows that the decision was received by the presenting officer at Birkenhead but it appears that the file and decision were erroneously sent to storage at that point and, regrettably, no further action was taken. Around that time, Milton Keynes became the office responsible for the work. There is no record of Judge Durance’s direction of 23 July 2018 having been received in either Birkenhead Benefit Centre or the Milton Keynes office.

6. The appellant attended a further Work Capability Assessment on 25 June 2018 and was placed in the Support Group from 9 July 2018. The delay has not therefore affected the appellant’s on-going receipt of benefits (although it has delayed consideration of historic entitlement for which the Secretary of State apologises).”

20. Given this decision, the decision in *NW* and what I have been told in CE/2506/2018, it is to be expected that the First-tier Tribunal’s

ENF/1494/2019

difficulties in obtaining relevant evidence from the Secretary of State, especially in cases where the Secretary of State has been directed to provide that evidence, will cease to be a matter of concern for the First-tier Tribunal and the Upper Tribunal.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

Dated 12th March 2020