IN THE UPPER TRIBUNAL **Appeal No. CPIP/2336/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

SB

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge K Markus QC

Decision date: 11 June 2020
Decided on consideration of the papers

Representation:
Appellant: By her appointee
Respondent: Decision Making and Appeals, Leeds

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 17 December 2018 under number SC061/18/00048 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**

4. **The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is the 16 October 2017. Any further evidence, to be relevant, should shed light on the position at that time.**

5. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

6. **The clerk to the First-tier Tribunal should send a copy of this decision to the presiding judge of the original panel.**

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

REASONS FOR DECISION

1. This is an appeal against a decision of the First-tier Tribunal ('FTT') that the Appellant was not entitled to either component of Personal Independence Payment ('PIP'). I gave permission to appeal on one ground only, which related to the fairness of the proceedings in the FTT.

2. The Secretary of State supports the appeal on that ground and has not requested an oral hearing. Although I had directed that the Secretary of State's submission be sent to the Appellant and that she would have an opportunity to respond before the file was returned to me for decision, due to the disruption caused by the Covid pandemic this did not happen. In the light of the position of the Secretary of State I do not consider that it is proportionate to further delay my decision. I have decided to allow the appeal for the reasons set out below and no purpose would be served by seeking the Appellant's reply to the Secretary of State's submissions. I have therefore waived the direction for the Appellant's reply.

Discussion and conclusions on the appeal

3. The Appellant's notice of appeal to the FTT was completed and signed by her representative. The grounds of appeal stated that one of the Appellant's daughters, Danielle, was her appointee. Neither the Appellant nor her representative was present at the oral hearing before the FTT but another daughter, Cheryl, was present. The record of proceedings stated "Took details from daughter, no disclosure of specific medical conditions to daughter". This indicates that, although the FTT allowed Cheryl to address them, they did not discuss the medical evidence with her and so it follows that they would not have put to her their concerns or doubts about the Appellant's case based on the medical evidence and she would not have had an opportunity to address them.

4. In the grounds of appeal to the Upper Tribunal, which were written by Cheryl, she said that she had been her mother's appointee for over one year but the DWP had failed to notify the FTT. It seems from Cheryl's description of the FTT hearing that she had explained this at the hearing. That is consistent with the notes on the tribunal's case management system which includes the following entry for 17 December 2018 (on the day of but after the hearing): "TC from app's daughter. She stated she was originally her mother's appointee but that it was transferred through the DWP to her sister earlier this year. Advised neither of them were on the system – her sister had gone to the hearing today but was not allowed to speak on her mother's behalf". It is clear from this that the

daughter making the telephone call was Danielle, referring to Cheryl having been appointed and having attended the hearing.

5. An email to the FTT from the Appellant's representative at that time sheds further light on what occurred. The representative explained that Cheryl was approved as the appointee but the DWP had failed to send the documentation to either Cheryl or he DPW. Because the FTT did not recognise Cheryl as the appointee she was "not allowed to give enough information to the panel due to confidentiality and therefore feels the decision made did not reflect how her mother is now or how she manages her daily living".

6. On the basis of the above, none of which has been contradicted by the Secretary of State, I am satisfied on balance of probabilities that the FTT did not share its views of the medical evidence with Cheryl and so she did not have an opportunity to address them. The result was that Cheryl could not participate fully in the hearing.

7. If the FTT did not have sufficient evidence before it to be satisfied that Cheryl was the appointee, it ought to have adjourned in order to enable that evidence to be provided rather than to proceed in the manner that it did. The documentation in the FTT bundle offered some support to Cheryl's claim to be the appointee, although there were also some documents which contradicted it. In any event, even if the FTT doubted that Cheryl was the appointee, the evidence in the bundle strongly indicated that both daughters were closely involved their mother's affairs and were providing her with assistance in relation to her benefits. There was at least a strong possibility that the Appellant would have wished Cheryl to represent her at the FTT hearing. The FTT should have adjourned in order to allow for clarification of the position as to whether Cheryl was the appointee or to give the Appellant an opportunity to provide written authorisation for Cheryl to represent her. It was not fair of the FTT to proceed on the day, restricting Cheryl's ability to participate in the hearing.

8. In any event, a copy has since been provided of the DWP's written approval of Cheryl as the Appellant's appointee, dated 10 July 2018. Cheryl was entitled to participate in the proceedings as the appointee but she was not able to do so. Accordingly the Appellant did not have a fair hearing.

9. I therefore set aside the FTT's decision and remit it to another tribunal to determine afresh.

<u>The FTT's handling of the application for permission to appeal.</u>

10. It would not be right to leave this appeal without saying something about the manner in which the FTT administration handled the Appellant's application for permission to appeal, which had the potential to do very grave injustice to the Appellant. The determination of the appeal does not turn on this and so my observations in this regard are not binding but are made pursuant to the Upper Tribunal's function of providing guidance.

11. The FTT refused the Appellant's appeal on 17 December 2018. On 7 June 2019 her then representative requested a set aside of the decision. The judge refused that request on or around 25 June. On 18 July the representative wrote to request a statement of reasons, and stated that the Appellant may wish to appeal the decision. They requested that the late request be accepted although offered no explanation for lateness. On 12 August HMCTS notified the Appellant that the judge had refused the request. The documentation on file shows that the reason for refusal was that the request was over 6 months late.

12. On 23 August 2019 the Upper Tribunal received an application for permission to appeal from the Appellant. On 11 September 2019 the Upper Tribunal sent the application to the FTT for consideration by a FTT judge. The application was not put before a FTT judge. On 8 October 2019 a clerk to the FTT wrote to the Appellant informing her that her application for permission to appeal had been rejected on the ground that it was received more than one month after the date of the tribunal's decision and because no statement of reasons had been prepared. The Appellant again sent the application for permission to appeal to the Upper Tribunal.

13. The First-tier Tribunal was wrong to reject the application for permission to appeal. The Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 do not prohibit the tribunal from considering an application for permission to appeal where it is late or there is no statement of reasons. There were two rules in play in this case. First, under rule 38(5)(b) the FTT could admit the application if it extended time under rule 5. Second, pursuant to rule 38(7)(c), if a person makes an application for permission to appeal after an application for a statement of reasons has been refused because of delay, the FTT must only admit the application for permission to appeal if it considers that it is in the interests of justice to do so. It is not open to the tribunal administration to reject an application which has been made late or without a statement of reasons. Whether to admit the application is a judicial matter. In deciding whether to admit or refuse to admit an application in these circumstances, a judge must consider whether to exercise the discretion to extend time pursuant to rule 5, and whether to admit it pursuant to rule 38(7)(c). Unfortunately the application was not put before a judge; it was rejected by the tribunal administration. I note in passing that the Appellant had offered an explanation for making the late application.

14. The Appellant sent the application for permission to the Upper Tribunal and it was placed before me. Rule 21(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that an application for permission to appeal must not be made to the Upper Tribunal unless the application has been refused or not admitted by the FTT. The FTT had done neither of those things, because the application had been rejected administratively. I decided that it would cause unnecessary delay to send it back to be placed before a FTT judge, and that justice was best served by the application being determined by the Upper Tribunal. Therefore, pursuant to the power in rule 5, I waived the strict application of rule 21(2) and gave permission to appeal.

15. I have set out this history because the unlawful rejection of the application by the FTT administration could have caused real injustice. It could well have led the Appellant to give up at that point. In this case, that would have meant that the Appellant would have been subject to a decision of the FTT which I have decided was made unfairly. Fortunately, this Appellant did not give up.

Signed on the original
on 11 June 2020

Kate Markus QC
Judge of the Upper Tribunal