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 East London First-tier Tribunal dated 16 April 2019 under file reference SC124/18/00697 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is in a position to re-make the decision under appeal. The decision the First-tier Tribunal should have made on 16 April 2019 is as follows:

> *This First-tier Tribunal does not have jurisdiction to hear this appeal. This is because the District Tribunal Judge did not have jurisdiction to make the decision of 22 November 2018, purporting to set aside the previous First-tier Tribunal decision of 7 November 2018. It therefore follows that the District Tribunal Judge's determination of 22 November 2018 is of no effect. The decision by the First-tier Tribunal of 7 November 2018 stands.*
>
> *It follows that the Appellant is entitled to the standard rate of the PIP daily living component for the period from 13 December 2017 to 12 December 2020 but to no award of the mobility component for the same period. The scoring descriptors are 1b, 3b, 4e, 5b and 6d for daily living (10 points) and 2b for mobility (4 points) (see pp.176-177).*

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

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds.

The Upper Tribunal's decision in summary

2. I allow the Appellant's appeal to the Upper Tribunal. The decision of the second First-tier Tribunal now under appeal involves a legal error. The second First-tier Tribunal had no jurisdiction to make the decision. For that reason alone, I set aside the second First-tier Tribunal's decision. The result is that the first First-tier Tribunal's decision, which had been wrongly set aside, stands.

The background to this appeal to the Upper Tribunal

3. The issue before the Tribunal was the Appellant's entitlement to Personal Independence Payment (PIP) on a renewal claim with effect from 13 December 2017. The sequence of decision-making (although it was somewhat unusual) is not in issue.

4. The Appellant had previously had an award of the standard rate of the PIP daily living component for the period from 1 May 2015 to 12 December 2017 (8 daily living points and 0 mobility points). The Appellant then made a renewal claim. On 13 December 2017, a DWP decision-maker decided that he scored 0 points for both daily living and mobility. Accordingly, his PIP renewal claim was refused. That refusal was maintained following a mandatory reconsideration. The Appellant appealed to the First-tier Tribunal (FTT). The hearing was fixed for 7 November 2018.

5. On 6 November 2018 the Legal Advice Centre, which was acting on behalf of the Appellant, e-mailed the FTT office with a detailed written submission and some further medical evidence. They asked for this to be passed on to the Judge.

6. On 7 November 2018, following the oral hearing, a First-tier Tribunal (FTT1) allowed the Appellant's appeal. The hearing was attended by the Appellant, his representative and an interpreter. A presenting officer was also present. FTT1 concluded that the Appellant scored 10 daily living points and 4 mobility points. It accordingly made an award of the standard rate of the PIP daily living component (but no mobility award) for the period from 13 December 2017 to 12 December 2020.

7. On 8 November 2018, the Legal Advice Centre e-mailed the FTT office with a request for a statement of reasons and the copy of the record of proceedings. No other request or application was made in the short e-mail.

8. On 22 November 2018, a District Tribunal Judge (DTJ) issued a 'Decision and Directions Notice', noting the Legal Advice Centre's request, and announcing that he had decided to set aside the FTT's decision of 7 November 2018. This was said to be on the basis of rule 37(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; "the 2008 Rules"), namely that "a document relating to the proceedings was not sent to the Tribunal at an appropriate time". According to the DTJ, "The Appellant's representative e-mailed detailed representations and additional medical evidence to HMCTS on 06/11/18, but this was not before the Tribunal when it made its decision". The DTJ directed a re-hearing.

9. The appeal was relisted for hearing on 9 January 2019 but had to be adjourned owing to the failure of the booked interpreter to attend (he or she had been given the wrong date). The re-hearing finally took place on 16 April 2019. The new First-tier Tribunal (FTT2) dismissed the appeal on this occasion and so confirmed the Secretary of State's decision of 13 December 2017. The Appellant scored 0 points for both daily living and mobility activities.

The proceedings before the Upper Tribunal

10. The Appellant's grounds of appeal were that FTT2 had no jurisdiction to deal with the appeal as the DTJ had no power to set aside the decision of FTT1. It was further argued that the decision to set aside FTT1's decision without seeking the parties' representations was unfair. I gave the Appellant permission to appeal.

11. Mr Wayne Spencer, the Secretary of State's representative in these proceedings, supports the appeal to the Upper Tribunal. He sets out his reasoning as follows:

"a) The power to set aside in rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 is dependent on an application being made, and an application for a statement of reasons does not count for this purpose (*per* the authorities discussed in paragraph 10 of the Judge's reasons for granting permission to appeal).

b) As no such application was made, the decision of the first tribunal was wrongly set aside.

c) In R(I) 7/94 a Tribunal of Commissioners held that "an appeal tribunal must, in the course of establishing whether it has jurisdiction to entertain an appeal, in the light of the broad principle of *res judicata*, be able to investigate whether an earlier decision of an appeal tribunal on the same appeal has been effectively set aside" (paragraph 27); but when doing so it may "only consider whether the earlier appeal tribunal had jurisdiction in the narrow sense of being entitled to enter on the consideration of the matter before it (and therefore to determine that matter)" (paragraph 28). In paragraphs 30-31 the Commissioners held that one of "essential elements which must be present in order for an appeal tribunal to have jurisdiction to entertain and determine a setting aside application" is that there has been a relevant application. By analogy, I submit that the absence of an application for setting aside in the instant case meant that the decision to set aside the first tribunal's decision was made without jurisdiction. It follows that the second tribunal had no jurisdiction to entertain and determine the claimant's appeal, and the first decision stood and finally disposed of the appeal (cf. paragraph 35 of the Commissioners' decision).

d) The decision now under appeal is erroneous in law."

Relevant procedural rules

12. There are three provisions in the 2008 Rules of particular note in the context of this appeal.

13. First, rule 2 provides as follows:

> **"Overriding objective and parties' obligation to co-operate with the Tribunal**
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> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Tribunal effectively; and
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> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
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> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

14. Second, rule 37 provides as follows:

> **"Setting aside a decision which disposes of proceedings**
> **37.**—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—
> (a) the Tribunal considers that it is in the interests of justice to do so; and
> (b) one or more of the conditions in paragraph (2) are satisfied.
> (2) The conditions are—
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
> (d) there has been some other procedural irregularity in the proceedings.
> (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 1 month after the date on which the Tribunal sent notice of the decision to the party."

15. Third, and finally, rule 41 provides as follows:

> **"Power to treat an application as a different type of application**
> **41.** The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."

The Upper Tribunal's analysis

Is the operation of rule 37 contingent on an application being made?

16. The fundamental question in this appeal is whether, as the Appellant's representative and Mr Spencer both submit, the power to set aside in rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 is dependent on an application being made, for which purpose an application for a statement of reasons does not count. I take those two points in reverse order, the latter being the more straightforward.

17. First, rule 41 of the 2008 Rules does <u>not</u> say that the Tribunal may treat a request for a statement of reasons and/or a copy of the record of proceedings as an application for a decision to be set aside (see to the same effect the observation by Upper Tribunal Judge Mitchell in *DC v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 150 (AAC) at paragraph 29). I note there is also at least one other similar deeming provision in the 2008 Rules. Where there has been no written statement of reasons issued, an application for permission to appeal must be treated as an application for such a statement (rule 38(7)(a) of the 2008 Rules). If the drafters of the 2008 Rules had wanted to make provision for an application for a statement of reasons (and/or the record of proceedings) to be treated as an application for a set aside, then they could have done so. They did not. There is also no obvious reason why they should have done so.

18. Second, the preponderance of authority in this Chamber is that the First-tier Tribunal cannot exercise the power to set aside of its own volition in the absence of a written application from a party to the appeal (see Upper Tribunal Judge Gray in *RR v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 403 (AAC) at paragraph 5; see also her conclusion that "the judge's power is limited by sub-paragraph (3) which provides that there must be a written application for such a set-aside" (at paragraph 14)). *DC v Secretary of State for Work and Pensions (ESA)* is to similar effect in that it establishes that the power to set aside is available only when an application has been made and admitted.

19. The only decision in this Chamber of which I am aware which takes the contrary approach is *MQ v Secretary of State for Work and Pensions and SQ (CSM)* [2017] UKUT 392 (AAC), where I made the following comment:

> "28. It also appears from the drafting of rule 37 that the First-tier Tribunal may exercise the power to set aside of its own initiative, without an application from any party, and indeed in principle may do so at any time. The one-month time limit for making a set aside request in rule 37(3) by definition applies only to applications by parties."

20. I now recant that heresy.

21. I note that my comment was somewhat tentative ("It also appears from the drafting…"). My observation in that case was made without the benefit of detailed argument and does not seem to have been essential to the reasoning in the decision. In mitigation, I can only echo Baron Bramwell's explanation in *Andrews v Styrap* [1872] 26 L.T. 704 and 706, namely "The matter does not appear to me now as it appears to have appeared to me then".

22. I have not been able to identify any treatment of this question in other Chambers. There is, however, a decision of the Upper Tribunal (Immigration and Asylum Chamber) on the equivalent rule (rule 43) in the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). In *Jan v Secretary of State for the Home Department (Upper Tribunal: set-aside powers)* [2016] UKUT 336 (IAC); [2016] Imm AR 1437, the Immigration and Asylum Chamber of the Upper Tribunal noted that "Although rule 43 contains provisions about the timing of an application for a decision to be set aside, no application is required. Thus, the Tribunal can exercise its jurisdiction under rule 43 on its own motion" (at paragraph 8). I do not consider that this observation applies with equal force in the First-tier Tribunal to rule 37 of the 2008 Rules, not least as the Upper Tribunal is a superior court of record (Tribunals, Courts and Enforcement Act 2007, section 3(5)). Moreover, as Sedley LJ held in *Akewushola v Immigration Officer, Heathrow* [1999] EWCA Civ 2099; [2000] 1 WLR 2295, "For my part I do not think that, slips apart, a statutory tribunal – in contrast to a superior court – ordinarily possesses any inherent power to rescind or review its own decisions."

23. However, the suggestion that the First-tier Tribunal may act of its own motion under rule 37 receives support from Upper Tribunal Judge Jacobs in *Tribunal Practice and Procedure* (Legal Action Group, 5th edition, 2019) at §15.29:

> "There is no express authority for, or prohibition on, the tribunal acting of its own initiative. This power may be implied, as it would be consistent with the enabling power in that respect under TCEA Sch 5 para 6."

24. Paragraph 6 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007 provides that "Rules may make provision about the circumstances in which the First-

tier Tribunal, or the Upper Tribunal, may exercise its powers of its own initiative." With respect, this argument appears to involve a degree of circularity. It is also important to read the 2008 Rules together, as a legislative package, rather than reading an individual rule in isolation. If rule 37 permits the First-tier Tribunal to act on its own initiative, then presumably it can do so at any time, as there is no indication it is constrained by the one month time limit imposed on parties making an application for a set aside (under rule 37(3)). However, rule 36, which provides for the correction of clerical mistakes and accidental slips or omissions, specifically provides that "The tribunal may at any time correct …" (with added emphasis, and those underlined words are noticeably absent from rule 37(1)). If it was intended that the First-tier Tribunal should have the power to set aside of its own motion, then one would expect either a one-month time limit or (by analogy with rule 36) an express open-ended power. In addition, rule 36 makes no specific provision for parties to make such an application, so by necessary implication the First-tier Tribunal can act under rule 36 of its own volition.

25. In addition, can it really be the case that a First-tier Tribunal is empowered, of its own initiative, to set aside one of its own decisions, months or even years after the event? The existence and exercise of a power unlimited in time is entirely understandable where the modification has no substantive impact on the parties (e.g. a slip rule correction under rule 36). However, rule 37 is specifically concerned with "Setting aside a decision *which disposes of proceedings*" (emphasis added). If such a power were unlimited in time, it would seriously undermine the principle and public good of finality in tribunal litigation.

26. Leaving the interests of finality aside, it is difficult to see what purpose would be achieved by the First-tier Tribunal being able under rule 37 to set aside a decision of its own accord. It is difficult to envisage any reason for doing so other than the need to avoid injustice. In that event, however, the answer surely is that the tribunal could invite the adversely affected party to make such an application under rule 37(3) and in doing so consider, if necessary, whether there is good reason to grant an extension of time under rule 5(3)(a). In such circumstances both the overriding objective and the interests of natural justice would typically suggest that the other party should be invited to make representations on the proposed course of action (see *GA v London Borough of Southwark (HB)* [2013] UKUT 170 (AAC) at paragraphs 14-16). Curiously, and for reasons that are not clear, the DTJ declined to take that course of action in the present proceedings.

27. That much is sufficient to decide this case. If, as I find, rule 37 requires an application by one of the parties, then the set aside decision was made in error of law and FTT2 lacked jurisdiction to hear the case. Mr Spencer's propositions (a) and (b) having been made out (see paragraph 11 above), propositions (c) and (d) follow remorselessly as a matter of logic. My only caveat is that the Tribunal of Social Security Commissioners' decision in *R(I) 7/94* was concerned with the set aside power in regulation 11 of the earlier Social Security (Adjudication) Regulations 1986 (SI 1986/2218). That provision expressly stated the power was to be exercised "on an application made by a party to the proceedings" (regulation 11(1)). However, for the reasons set out above, I find that requirement is also implicit in the current rule 37.

28. FTT2 accordingly erred in law because it failed to appreciate that it lacked jurisdiction to hear the appeal, as the DTJ had had no power to set aside the decision of FTT1. In so far as is necessary, I waive the requirement to seek permission to appeal specifically with regard to the set aside decision and/or extend time as appropriate. The DTJ's set aside decision was not an excluded decision under

section 11(5)(d)(iii) of the Tribunals, Courts and Enforcement Act 2007 as it was not taken under section 9 (on review), but purportedly under rule 37.

The other problems with the DTJ's set aside decision

29. As discussed above, the main problem with the DTJ's set aside decision was that in the absence of a written application from one of the parties he had no power to take such a decision.

30. There were two other problems with the set aside decision. One of these has been touched on above, namely that as a matter of natural justice, given the outcome of FTT1, this was a case in which the Appellant should have been asked for his representations before any such decision to set aside was taken (see *GA v London Borough of Southwark (HB)* [2013] UKUT 170 (AAC)). The overriding objective of dealing with cases fairly and justly demanded nothing less.

31. The other problem was the evidential basis for the DTJ's finding that rule 37(2)(b) was satisfied, namely that "a document relating to the proceedings was not sent to the Tribunal at an appropriate time". (There was also no consideration in the set aside decision of the "interests of justice" requirement under rule 37(1)(a).) In any event, according to the DTJ, "The Appellant's representative e-mailed detailed representations and additional medical evidence to HMCTS on 06/11/18, but this was not before the Tribunal when it made its decision". The basis for the finding that the late submission "was not before the Tribunal when it made its decision" is obscure. There was no explanation for this finding in the set aside decision itself. However, in the subsequent ruling refusing permission to appeal the DTJ gave several reasons for the finding that the documents had not made their way to FTT1. None is persuasive.

32. The first reason was that the representative's submission with its attachments was not in the Judge's bundle for the hearing. It is true that the submission and extra medical evidence appeared in the paginated bundle after FTT1's record of proceedings and decision notice, and indeed after the post-hearing e-mail of 8 November 2018. However, it is a bold or foolhardy judge who confidently relies on the pagination in an HMCTS appeal bundle as correctly and invariably mirroring the true chronological sequence of documents.

33. The second reason was that FTT1's record of proceedings made no reference to the submissions and enclosures in the grid on page 1 entitled "DOCUMENTS HANDED IN *PRE / *AT THE HEARING AND RETAINED AFTER THE HEARING AND NUMBERED 1-". This belies a similarly ambitious assumption – that all judges in busy tribunals conscientiously remember to make such an entry and mark up and number any late submissions accordingly. The real world simply does not work like that.

34. The third reason was that, according to the DTJ, the GAPS record disclosed the only recorded action as being that the Legal Advice Centre were representing the Appellant: "There was no record of the submissions and enclosures being forwarded from Sutton to the East London hearing centre." This was simply wrong. There is a print-out of GAPS clerical entries on the FTT administrative file. The entry for 6 November 2018, the date before the hearing, states (emphasis added):

> "FE [further evidence] received from rep on 6/11/18 by email, Not issued due to lack of time. **Sent to venue**. Rep already added to GAPS."

35. The fourth reason was that "there was no reference in the record of proceedings to their being considered". Unfortunately, and on a fair reading, wrong again. The start of the Judge's record of proceedings read as follows:

> "*Intro*
> *PO [[Presenting officer] argued descriptors 1(b), 4(b), 5(b), 6(b). Not sure mobility."*

36. It will be recalled this was a case in which the original DWP decision under appeal found the Appellant had scored zero points for both components (confirmed on mandatory reconsideration). The representative's last-ditch written submission to FTT1 had argued for daily living descriptors 1(b) (or 1(c)), 3(b) (or 3(c)), 4(b) (or 4(d) or 4(e)), 5(b) (or 5(d)), 6(b) (or 6(d)), 7(b) (or 7(c)) and mobility descriptor 2d. The concessions noted in the record of proceedings did not appear out of thin air. The only sensible inference is that the presenting officer had seen and considered the representative's submission and conceded some but not all of the points sought. Indeed, the representative reported (in the application to the FTT for permission to appeal) that that was precisely what had happened (p.289). It is simply not plausible that the representative's written submission and extra evidence were in front of the presenting officer but not before FTT1.

37. I am therefore entirely satisfied that the representative's submission and enclosures were all before FTT1, even though they had been emailed to the relevant HMCTS reginal tribunal office only the day before the hearing. It follows that even if the DTJ had had jurisdiction to consider directing a set aside, there was no proper evidential basis for finding that rule 37(2)(b) was met.

38. I am satisfied that the First-tier Tribunal erred in law for the reasons set out above and in the extract from Mr Spencer's helpful submission. I therefore allow the Appellant's appeal to the Upper Tribunal and set aside the decision by FTT2. I formally find that FTT2's decision involves an error of law on the ground as outlined above. I replace FTT2's decision with a decision of my own to the effect that the decision of FTT1 stands:

> *This First-tier Tribunal does not have jurisdiction to hear this appeal. This is because the District Tribunal Judge did not have jurisdiction to make the decision of 22 November 2018, purporting to set aside the previous First-tier Tribunal decision of 7 November 2018. It therefore follows that the District Tribunal Judge's determination of 22 November 2018 is of no effect. The decision by the First-tier Tribunal of 7 November 2018 stands.*
>
> *It follows that the Appellant is entitled to the standard rate of the PIP daily living component for the period from 13 December 2017 to 12 December 2020 but to no award of the mobility component for the same period. The scoring descriptors are 1b, 3b, 4e, 5b and 6d for daily living (10 points) and 2b for mobility (4 points) (see pp.176-177).*

39. In making this decision I have not overlooked the possible concern that the Appellant should in some way be regarded as being estopped from arguing that FTT2 lacked jurisdiction, given there had been no timely challenge to the DTJ's set aside ruling. The DTJ put it in this way, when refusing permission to appeal: "I am not satisfied that it is in the interests of justice to set aside that direction; it was open to the Appellant to request that it be set aside at the time, but he did not do so. Rather it appears that he elected to have his appeal go to a fresh Tribunal in the hope that a

higher award would be made than that made initially: it is not in the interests of justice for the Appellant to pick and choose in this way."

40. Judge Gray was alive to that issue in *RR v Secretary of State for Work and Pensions (ESA)*:

> "7. I can see no record of the claimant's solicitor having challenged that set-aside decision at the time. It is academic in terms of my conclusions, but I was at one point troubled by that. There did seem to me to be a question to whether acquiescing in a course of conduct (the re-hearing) might be seen as tacit acceptance of a procedural step that has taken place without a specific application, and that may be a point that will be under consideration in another case. Here, because a written application is required and without one the DTJ had no jurisdiction to act as he did the point is, in this case, immaterial."

41. There are two reasons why I have concluded that the Appellant had not acquiesced such that he is now estopped. The first is that the setting aside decision was only accompanied by the template statement that "A party is entitled to challenge any direction given by applying for another direction which amends, suspends or sets aside the first direction". That formulaic statement is entirely appropriate for issue with a case management direction (see rules 5 and 6); it is much less well suited to go with a set aside decision, which is an appealable decision (unless it is made under section 9)

42. The second, and much more fundamental, reason is a question of principle. It is axiomatic that jurisdiction cannot be conferred on a statutory tribunal either by the consent of the parties or their acquiescence, where it would not otherwise exist (see the authorities cited in *Tribunal Practice and Procedure* (paragraph 23 above, at §2.29).

Conclusion

43. I therefore conclude that the decision of the First-tier Tribunal under appeal involves an error of law. The District Tribunal Judge could not act of his own motion under rule 37 of the 2008 Rules in the absence of a written application for a set aside. Moreover, he had no proper evidential basis for finding that rule 37(2)(b) was satisfied. Furthermore, the overriding objective and natural justice required that the Appellant be given notice of the proposed course of action. He therefore had no jurisdiction to make the set aside decision, which meant that the second First-tier Tribunal had no jurisdiction to consider the appeal as the decision of the first First-tier Tribunal stood. I allow the appeal against the decision of the second First-tier Tribunal and set aside the decision of that Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I re-make the decision of the second First-tier Tribunal in the terms as set out above at paragraph 38 (section 12(2)(b)(ii)). My decision is also as set out above.

(Approved for issue on 25 May 2020)

Nicholas Wikeley
Judge of the Upper Tribunal