IN THE UPPER TRIBUNAL **UA-2024-000693-DLA**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 223 (AAC)**

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008
(statutory instrument number 2008/2698)

Applicant:	**OU (mother and appointee for SRU)**
Tribunal:	**The First-tier Tribunal (Social Entitlement Chamber)**
Tribunal Case No:	**SC124/23/03184 &1696-5010-6442-7101**
Tribunal Venue:	**Remote: part video, part telephone**
Hearing Date:	**12 March 2024**
Respondent:	**The Secretary of State for Work and Pensions**

NOTICE OF DETERMINATION OF
APPLICATION FOR PERMISSION TO APPEAL
28 July 2024

1. This permission to appeal application was received in time on 24 May 2024. The deadline was 10 June 2024.

2. I refuse permission to appeal to the Upper Tribunal.

3. I do not grant an oral hearing of this application.

REASONS

Reasons for not granting an oral hearing

4. The appointee's stated reasons for requesting an oral hearing rehearse her detailed written grounds for seeking permission to appeal. Those grounds do not disclose any arguable error of law, as I explain below. Rehearsing the grounds orally would make no difference to their merits. Holding an oral hearing for the appointee to rehearse the grounds orally would merely give false hope.

Reasons for refusing permission to appeal

5. There is no arguable error of law, for the following reasons.

6. I have grouped the submissions into numbered grounds.

Ground (1)

7. Ground (1) is that the finding that SRU had no accidental exposure to known allergies is wrong: she had one in a coffee shop in Poland in 2019 and one at home in 2018 (and she only had an expired EpiPen because the GP had refused to represcribe it due to first consultant's wrong diagnosis). And she had one on 16 May 2024.

8. Ground (1) discloses no arguable error of law. The First-tier Tribunal did not make a finding that SRU had had no accidental exposure to known allergies. In any event, accidental exposure to allergies in 2018 and 2019 did not show any needs in the required period, which began three months before 21 April 2023. The alleged incident of 16 May 2024 does not help either. It came after the First-tier Tribunal had made its decision and after the date of claim. The alleged incident was not relevant to the forward look that had to be taken as at the date of claim.

Ground (2)

9. Ground (2) is that frequent attention throughout the day in connection with bodily functions is satisfied because: (i) Even with the most recent incident, which took place at school on 16 May 2024, SRU came into contact with contaminated food (and the school nurse gave anti-histamines). (ii) When having a food allergy or asthma attack, SRU sometimes requires carrying or support to move from one room to another. (iii) Most recently, we have also been staying awake at night as a result of asthma attacks that SRU gets between three to six nights a week from the hours of 12-5 am for about 30 minutes to an hour as a result of choking and wheeziness due to severe asthma attacks at night. This has been increased and ongoing since 2023 after the DWP discontinued SRU's DLA.

10. Ground (2) discloses no arguable error of law, for the following reasons.

(i) Even with the most recent incident, which took place at school on 16 May 2024 when she came into contact with contaminated food (and school nurse gave anti-histamines)

11. The alleged recent incident of 16 May 2024 does not show frequent attention throughout the day at school, even if the incident could be taken into account, which it cannot (see analysis of Ground (1) above).

(ii) When having a food allergy or asthma attack, SRU sometimes requires carrying or support to move from one room to another

12. The evidence from the person at the school, Mr F, to whom the appointee had directed the DWP did not disclose allergy or asthma attacks requiring any carrying or support to move from one room to another. Indeed, Mr F mentioned no difficulties walking in school. It was open to the First-tier Tribunal in view of that, and of the other evidence before it, including the number of asthma attacks requiring hospital admission, to conclude that SRU did not need frequent attention throughout the day in the form of carrying or support (and that she is not virtually unable to walk either).

(iii) Most recently, we have also been staying awake at night as a result of asthma attacks that SRU gets between three to six nights a week from the hours of 12-5 AM for about 30 minutes to an hour as a result of choking and wheeziness due to severe asthma attacks at night. This has been increased and ongoing since 2023 after the DWP discontinued SRU's DLA.

13. The appointee does not appear to have told the First-tier Tribunal this. In any event, it is not apparent whether it would have been evidence that would have shed light on the forward look that was required to be made by the DWP decision maker when making the decision.

(iv) Generally as to Ground (2)

14. Generally as to Ground (2), the evidence from Mr F of the school, as summarised by the First-tier Tribunal at paragraph 43, painted a picture of the attention that the school gave that was much different from the picture painted by the appointee. It was open to the First-tier Tribunal to prefer what Mr F had said to what the appointee said, about what happened at school. And it was open to the First -tier Tribunal to find that what Mr F had said did not show attention for a significant portion of the day at school or frequent attention at school (or continual supervision at school substantially beyond that needed by the other 12-year-olds).

15. As to attention at home on days off due to asthma or allergies, the counting exercise at paragraph 44(e) was open to the First-tier Tribunal on the evidence before it. The First-tier Tribunal did not give a final number of days' absence that were potentially due to the asthma and allergies, which it ideally should have done. But even if only the six days were deducted for the America holiday, and if the remaining 41 days' absence were all attributed to asthma and allergies (which the First-tier Tribunal did not find), that was less than two days per school week. While SRU would indeed have needed attention at home on those days off, it was open to the tribunal to find that that number of days did not suffice to satisfy the test in section 72(1) that the need be "*for any period throughout which*". That phrase has been construed to mean not every day. Plus it can in some cases not even be limited to the majority of the days of a week (*R(A) 2/74*). But in *R(A) 2/74*, the commissioner said—

> "I think that the delegate should take a broad view of the matter, asking himself some such question as whether in the whole circumstances the words of the statute do or do not as a matter of the ordinary usage of the English language cover or apply to the facts. These are matters for the good sense and judgment of the delegate".

16. It was open to the First-tier Tribunal in view of that not to find satisfied the "*period throughout which*" test in section 72(1).

Ground (3)

17. Ground (3) is that SRU does need continual supervision throughout the day in order to avoid substantial danger to herself or others, both at home and

school and anywhere else during events and activities that she attends because (i) she has to carry her EpiPens and anti-histamines everywhere she goes; and (ii) her parents have to provide the host at the venue, or the medical personnel, her care plan and hand them the medication she carries to administer if needed. A classic incident that took place was during her friend's birthday party in 2023. The host's mum called the parents for advice after SRU came in contact with contaminated food and she asked for advice on how to administer the medication that the parents had handed to her.

18. Ground (3) discloses no arguable error of law, for the following reasons.

(i) Carrying her own EpiPen and anti-histamines everywhere she goes

19. Carrying her own EpiPen and anti-histamines does not amount to anyone supervising SRU or to her needing continual supervision (substantially beyond that required for any child her age).

(ii) Providing medication and a "care plan" to a host or medical personnel

20. Providing medication and a "care plan" to a host or medical personnel does not show continual supervision or a need for continual supervision. Nor does it amount to continual supervision if the host has to administer any medication to SRU <u>if</u> SRU has an episode. That is so even on a much more moderate construction of "*period throughout which*" that does not require the need to be there every day or even on a majority of the days of a week.

Ground (4)

21. Ground (4) is that SRU needs substantially more care than other children her age need because not all children (i) require continuous [sic] supervision at home, at school, and while attending activities, events, and even friends' birthday parties; (ii) carry medication everywhere they go; (iii) have a healthcare plan; (iv) have frequent attendance of hospital or medical appointments; (v) have someone ensuring that their medication is taken at the right time every day both day and night; (vi) have their foods specially prepared or monitored for contaminants; (vii) have a designated health or medical staff or a host to watch over them and prevent medical incidences or monitor them for hours or administer medication after a food allergy incident or during an asthma attack.

22. Ground (4) discloses no arguable error of law, for the following reasons.

(i) Supervision

23. It was open to the First-tier Tribunal to find that the level of supervision needed is not substantially in excess of what is needed for someone of SRU's age, especially given that she is of an age to carry her own EpiPen. SRU was still only 12 at the relevant time. She would not be expected to be without adult supervision anyway.

24. Moreover, the appointee's evidence was that she "*thinks the school nurse stores the inhalers and SRU will then tell the school if she needs it*" (paragraph 26). So the evidence was that, even when an inhaler <u>is</u> needed at school, that

need is identified not from supervision of SRU but by her bringing the need to the attention of the school.

(ii) Carrying her own medication everywhere she goes

25. It was open to the First-tier Tribunal not to find that SRU carrying her own medication shows any need for attention or for continual supervision (whether beyond that needed by any 12-year-old of her age or at all). It does not show attention or supervision at all.

(iii) Having a healthcare plan

26. The First-tier Tribunal appeared to accept that SRU had an allergy action plan and a care plan (paragraph 34). But the First-tier Tribunal found that she did not have an EHCP (paragraph 44(d)). The existence of the allergy action plan and of the care plan did not show a need for substantially more supervision than is needed for other children of SRU's age.

(iv) "Frequent attendance of hospital or medical appointments"

27. The number of actual hospital admissions for asthma was not, on further examination of the appointee, as great as she had first indicated. The First-tier Tribunal recorded—

> "**Summary of oral evidence from OU during the hearing**
>
> 21. SRU's asthma has got worse over the last few years. She was recently admitted to hospital multiple times…
>
> 22. … With reference to the hospital admission on 21.7.23, we mentioned to OU that this recorded only 1 A&E visit in the preceding 2 years. OU said that was for [K] Hospital but sometimes SRU goes to other hospital as it depends on the Ambulance Service too. She mentioned [T] Hospital and [another hospital].
>
> 23. We asked how many hospital admissions SRU had from 1.1.23 to Summer of 2023 and that it appeared from the documentation to be 1. OU thought it probably was 1.".

28. As to non-admission hospital and medical appointments, it was open to the First-tier Tribunal not to find that they amounted to frequent attention or attention for a significant portion of the day, or that they amounted to supervision substantially beyond what another 12-year-old would need.

(v) Having someone ensuring that SRU's medication is taken at the right time every day both day and night

29. The First-tier Tribunal found (paragraph 44(j))—

> "We found that SRU may need reminding to take her medication but that degree of reminding was likely to be in keeping with other children of her age (12) who need mediation. We accepted that SRU may need some assistance to ensure that she is using her inhalers properly. We were not

> persuaded that SRU needed help 4 nights each week due to breathlessness and not being able to sleep during the RP. If that was so we would have expected her to have missed even more school than she did and also that there would have been more medical advice and guidance about these issues.".

30. Those findings were open to the First-tier Tribunal on the evidence before it, for the reasons it gave.

(vi) Having her foods specially prepared or monitored for contaminants

31. The First-tier Tribunal found (paragraph 44(h))—

> "Although greater care has to be given by her parents around food preparation, most children who are 12 (like SRU was when the claim was made) do not purchase or prepare their own food.".

32. That finding was open to the First-tier Tribunal.

33. As to monitoring of food at school, even if that could amount to frequent attention or attention for a significant portion of the day, or to continual supervision beyond that required by other 12-year-olds, it was not suggested or found that the school does have to monitor SRU's food. The First-tier Tribunal recorded the following oral evidence from the appointee (paragraph 26)—

> "With food, this is prepared by the parents to avoid contaminants which will cause allergy reactions. At school she takes packed lunch but she can eat herself".

34. Although the appointee now asserts that there was an incident at school on 16 May 2024, that evidence was not before the First-tier Tribunal, so it did not err in law in not taking it into account. Moreover, that incident post-dates the date of claim, the decision date, the required period and the First-tier Tribunal's decision. The incident does not on the face of it shed light on the forward look that had to be taken by the Secretary of State's decision maker and would not satisfy the test in *Ladd v Marshall* [1954] EWCA Civ 1, [1954] 1 WLR 1489.

(vii) Having a designated health or medical staff or a host to watch over SRU and prevent medical incidences or monitor her for hours or administer medication after a food allergy incident or during an asthma attack

35. The evidence did not support that staff or a host had to watch over SRU substantially more than they had to watch over other 12-year-olds.

Generally

36. I understand that SRU's mother is frustrated and aggrieved that SRU is found no longer to have the needs that she had under the previous award. But the First-tier Tribunal found that, as SRU has got older, those needs have become less. The First-tier Tribunal summarised this at paragraph 44(l)—

> "We accepted that when SRU was younger she may have had more need for help from her parents as some of the daily care activities she would need to do may have been tasks she would have needed assistance with. That may well explain why the DWP had made the award it did previously. However, at the time of the decision under appeal, SRU was older and more capable of undertaking most of the tasks by herself. Where she would take longer or may have been reluctant resulting in some assistance being provided, we did not consider this to be in excess of what another child of the same age would require.".

37. Those findings were open to the First-tier Tribunal. The First-tier Tribunal gave an adequate explanation for them in that paragraph 44(l) taken with the rest of the statement of reasons.

Conclusion

38. It is for all of the above reasons that permission to appeal to the Upper Tribunal is refused.

Observations

39. The First-tier Tribunal may wish to reflect on whether it was appropriate (or lawful) to require the appointee to repeat her request for a statement of reasons. I understand the appointee's feeling of grievance about that.

40. In its 3 April 2024 Directions Notice, the First-tier Tribunal responded to what it found to be an in-time request from the appointee for a statement of reasons. I have reproduced the Directions Notice in the **annex** to this decision.

41. After setting out 11 paragraphs of potential future procedure, the First-tier Tribunal went on in the Directions Notice to say—

> "You can see from the various steps that are possibly involved, this process can take a very long time – possibly up to 12 months or even longer".

42. The Directions Notice then gave the following direction—

> "Within 3 weeks of the date that this Notice is issued, please write to the Tribunal (an email is fine) to confirm either:
>
> (a) That you do wish for a SoR to be produced; or
>
> (b) That you wish to withdraw your application for a SoR".

43. The Directions Notice warned that the application for a statement of reasons may be struck out absent compliance with that direction.

44. The Directions Notice gives the appearance of seeking – over 11 paragraphs – to dissuade the appointee from seeking a statement of reasons.

45. The Directions Notice appears to suggest, as its motivation, a concern about the trouble the appointee would go to in seeking to appeal the First-tier Tribunal decision and in potentially successfully appealing and securing

remittal. But such a concern would not need to – nor should it – save the tribunal the trouble of preparing the statement of reasons. Merely receiving the statement of reasons would not cause the appointee to seek to appeal the First-tier Tribunal's decision or cause her to put herself to more trouble.

46. Moreover, the direction and strikeout warning were misconceived. The appointee had made an in-time application for a statement of reasons and had not withdrawn it. So the application remained pending before the First-tier Tribunal. The application did not need to be made again to be so pending and to have the effect provided for by the rules. Equally, the appointee did not have to say that she did not withdraw the application for the application to have the effect provided for by the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (S.I. 2008/2685). The effect provided for by those rules was that the First-tier Tribunal was required by rule 34(5) to supply a statement of reasons—

> "(5) If a party makes an application in accordance with paragraphs (3) and (4) the Tribunal must, subject to rule 14(2) (withholding information likely to cause harm), send a written statement of reasons to each party within 1 month of the date on which it received the application or as soon as reasonably practicable after the end of that period.".

47. The Directions Notice placed conditions on the entitlement conferred by rule 34(5), beyond the condition already contained in that rule.

48. The appointee in this case was not dissuaded from seeking the statement of reasons to which she was entitled. But it is concerning that there could be other cases in which claimants are being so dissuaded by directions along the lines of those given on 3 April 2024 by the First-tier Tribunal in this case.

49. It is because of my observations at paragraphs 39 to 48 above that I am having this decision published.

Rachel Perez
Judge of the Upper Tribunal
28 July 2024

Annex to Upper Tribunal decision

First-tier Tribunal's 3 April 2024 Directions Notice

"**DIRECTIONS NOTICE**

Reference to page numbers of the appeal bundle appear in square brackets '[ ]. Additions e.g. Addition D, pages 1-4 are shown as [D1-4].

BACKGROUND

1. Mrs [OU] is the appointee for her daughter, [SRU]. OU appealed against a decision made by the DWP about SRO's [sic] claim for Disability Living Allowance (DLA). On 12.3.24 the Tribunal made a decision on the appeal [Z1]. That decision was made following a hearing on the same day. OU attended the hearing (together with her husband) and provided oral evidence.

2. On 15.3.24 the Tribunal received a short email from OU [Z2] in which OU applied for a Statement of Reasons (SoR) for the Tribunal's decision. That application was made within the time limit set out in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (TPR).

3. The decision made by the Tribunal was to refuse OU's appeal and confirm the decision made by the DWP that [SRU] did not meet the conditions for an award of DLA.

DIRECTIONS

To Mrs [OU]:

4. I am making a direction to you towards the end of this notice. Before I set that out, I have taken some time to set out some important information which I hope will help you consider what you wish to do.

5. At this stage, I am staying (putting on hold) your application for a SoR so that you can have an opportunity to consider what I have explained in this Notice and then decide what you would like to do.

6. As explained above and as you are aware, the decision that was made was taken following a hearing which you attended. If you want to challenge the decision that was made, first of all a SoR would need to be produced, you would then need to consider that and make an application for PtA to the UT. That would be considered by me in the first instance. If I found that the decision was made in error of law then I would review the decision. Following the review, it is quite likely that I would not be able to re-make the decision of 12.3.24 and so I would set aside the decision and direct that a new Tribunal panel consider the appeal afresh which would include a new hearing.

7. If I was to refuse PtA to the UT and if you were not happy about that, you could [sic] then need to renew your application for PtA directly to the UT. The UT would then need to consider the application and make a decision about whether to grant or refuse PtA. If it granted PtA then the UT would have to go on to decide whether the appeal should be allowed (succeed). If it decided that the appeal should be allowed, again it is quite likely that the UT would not be able to re-make the decision of 12.3.24 but instead the UT would set aside the Tribunal's decision and remit (return) the appeal to the Tribunal so that a new Tribunal panel can consider the appeal afresh. You can see from the various steps that are possibly involved, this process can take a very long time - possibly up to 12 months or even longer.

8. Please bear in mind that if the Tribunal's decision were to be set aside by me or the UT, there is no guarantee of any particular outcome as a new panel will be charged with making a new decision. That new panel will decide the entire appeal afresh. That panel may come to the same decision as that made on 12.3.24.

9. I remind you of what was explained in the Decision notice:

> "We found that during the period we had to consider, [SRU] did not meet the legal eligibility conditions for an award of either component of DLA. We know that [SRU] has health conditions and we know that these impact her, however having considered all the evidence (including all of Ms [OU's] oral evidence) we found on the balance of probabilities that [SRU] is not so restricted for the majority of the time to be eligible for DLA.
>
> Ms [OU] told us that things for [SRU] at the present day [are] [sic] worse now. If that is so, then Ms [OU] may wish to consider making a new claim for DLA. We were naturally limited to considering only how matters for [SRU] stood around the time the DWP made the decision under appeal."

10. The Tribunal on 12.3.24 had to look at how things were around the time the DWP made the decision rather than how things were at the date of the hearing itself on 12.3.24. If things got worse after the DWP's decision was made, that does not mean that the Tribunal's decision was wrong. During the hearing, you told us that [SRU's] asthma had got worse and more recently she had many hospital admissions. Given what you said about things being worse for [SRU] more recently, you may want to consider contacting the DWP make [sic] a new claim for DLA as the DWP will then have to look at [SRU's] current circumstances. If you do this the DWP will arrange for a new assessment to be carried out (to assess [SRU's] current circumstances) and it will make a new decision. Of course, if you are dissatisfied with that decision, you will have a right to mandatory reconsideration and then a right of appeal to the Tribunal.

11. You may wish to make a new claim for DLA while at the same time seeking to challenge the Tribunal's decision of 12.3.24.

12. Please be aware that the points which are made above do no more than set out the relevant legal position. Those points do not comment on the merits of any action you decide to take.

13. **DIRECTION TO MRS [OU]**: Within 3 weeks of the date that this Notice is issued, please write to the Tribunal (an email is fine) to confirm either:

    (a) That you do wish for a SoR to be produced; or
    (b) That you wish to withdraw your application for a SoR.

14. If you do not comply with the direction above by the time limit, you are warned that the application for a SoR (which is currently stayed) may be struck out on the basis that you have not complied with a direction of the Tribunal and that direction provided a warning to you about a possible striking out of part of the proceedings.

To the Tribunal clerk:

15. Please refer the file to DTJ [name of judge] for interlocutory consideration after compliance with these directions or in default, 3 weeks after the date this Notice was issued.

A party is entitled to challenge any direction given by applying for another direction which amends, suspends or sets aside the first direction. The Appellant may wish to seek advice from a welfare rights organisation, Citizens Advice or a law centre."

[End of annex to Upper Tribunal decision]