



Neutral Citation Number: [2025] UKUT 409 (AAC)
Appeal No. UA-2024-001514-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

MM

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

**Before: Upper Tribunal Judge Butler
Decided on consideration of the papers**

Representation:

Appellant: Represented self

Respondent: Ms J. Coleman, Decision Making and Appeals, DWP

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: SC288/24/00031

Tribunal Venue: Leeds

Date: 14 March 2024

SUMMARY OF DECISION

**PERSONAL INDEPENDENCE PAYMENT (40); TRIBUNAL PRACTICE AND
PROCEDURE (27).**

Judicial summary

This Decision considers the duty on a First-tier Tribunal (“FTT”) when deciding whether or not to determine an appeal on the basis of the appeal papers, applying rules 2 and 27 of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008.

As part of this the Upper Tribunal considers where the FTT might locate copies of the notifications HM Courts and Tribunals Service sends to appellants about requesting an oral hearing, and what they might say.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

As the decision of the First-tier Tribunal involved the making of an error of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the First-tier Tribunal for rehearing by a fresh tribunal.

DIRECTIONS

- A. The case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.
- B. The new tribunal should not involve any of the panel members previously involved in considering this appeal on 14 March 2024.
- C. The new Tribunal must not take account of circumstances that did not apply at the time of the Secretary of State's decision dated 11 September 2023. Later evidence can be considered if it relates to the circumstances at the time of that decision: see *R(DLA) 2/01* and *R(DLA) 3/01*.
- D. If the parties have any further written evidence to put before the tribunal, they should send this to the relevant HMCTS regional tribunal office within six weeks of the issue of this decision.
- E. The tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome from the previous tribunal.
- F. Copies of this decision, the permission to appeal decision, and the submissions on behalf of the Secretary of State (dated 10 February 2025) shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.

These Directions may be supplemented by later directions by a tribunal judge, registrar, or case worker, in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Factual background

1. On 27 June 2023, MM made a claim for personal independence payment ("PIP"). Acting on behalf of the Secretary of State for Work and Pensions, the Department for Work and Pensions ("DWP"), asked MM to take part in a video medical consultation on 09 September 2023. Having received advice from that consultation, DWP awarded MM descriptors 1.b and 5.b (4 points) for

PIP daily living activities and 0 points for mobility activities. As the threshold for an award of either component of PIP is 8 points, DWP decided MM was not entitled to an award.

2. MM appealed to a First-tier Tribunal on 29 November 2023. MM's appeal was determined by a First-tier Tribunal ("FTT") on the basis of the appeal bundle papers on 15 March 2024. The FTT confirmed DWP's decision and refused MM's appeal.

Permission to appeal

3. On 08 October 2024, the Upper Tribunal received an application from MM, asking for permission to appeal against the FTT's decision. In a decision dated 07 January 2025, I granted MM permission to appeal on the basis it was arguable the FTT had made one or more of the following errors of law.
4. Proceeding to determine MM's appeal on the papers: At paragraph 1 of its Statement of Reasons, the FTT gave a detailed explanation of its decision to determine MM's appeal on the papers. However, the explanation arguably did not address the following matters:
 - (a) In the "*Anything else you want to tell the tribunal*" section of your SSCS1 appeal form, MM wrote that as her symptoms are hard to manage, she had chosen not to attend the tribunal in person as she was incapable of leaving the house, but she could join online (page 3 of appeal bundle). It was unclear whether, and if so how, the FTT considered this factor when deciding to determine MM's appeal on the papers;
 - (b) The notifications section in Judicial Case Manager / Core Case Data (the HMCTS online appeals system) confirms HMCTS emailed MM on 17 January 2024 that DWP had responded to her appeal and she would receive an appeal bundle. The email stated MM had asked for her appeal to be determined on the papers but if she decided she wanted to attend the hearing after reading DWP's response, or wanted a telephone hearing, she should phone a telephone number (provided) but would need to give reasons for why she wanted any telephone hearing. There was no reference to MM being able to request a video hearing, despite this being a mode of oral hearing the First-tier Tribunal could, in principle, offer and arrange; and
 - (c) The FTT wrote there was no unfairness in deciding the appeal on the papers as MM had been given the opportunity to put her case. It wrote elsewhere in the Statement of Reasons, however, that MM's evidence was inconsistent in her PIP2 questionnaire, her SSCS1 appeal form, and her letter dated 12 February 2024. The FTT wrote that the inconsistencies reduced the weight it could give to MM's evidence (paragraph 16 of Statement of Reasons). The FTT did not explain how, in the context of this evaluation, it remained able to fairly and justly determine the appeal in MM's absence (to comply with rules 2 and 27 of

the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 (“the FTT Rules 2008”).

5. Evaluating the evidence adequately regarding MM’s stated mental health issues: DWP’s Response to MM’s appeal stated at page C of the appeal bundle that when she requested mandatory reconsideration of its decision, by phone on 27 September 2023, MM stated she was receiving medication for her mental health, namely codeine for stress and anxiety, and that stress was aggravating her colitis. In MM’s PIP2 questionnaire dated 21 July 2023, she wrote that she had tried beta blockers to manage her panic attacks but felt they did not work (page 45 of appeal bundle). The FTT did not address this evidence about MM’s stated mental health difficulties in the Statement of Reasons.
6. The FTT also stated that MM reported being put onto 50mg of sertraline after the date of DWP’s decision but that as this is after the decision, it could not take it into account. The FTT was clearly contemplating the restriction in section 12(8)(b) of the Social Security Act 1998, but this restriction relates to changes in circumstances. Evidence obtained after the date of DWP’s decision remains admissible, provided it relates to the circumstances at the time of the decision: see **R(DLA) 2/01** and **R(DLA) 3/01**. It is unclear whether the FTT applied the correct legal test in excluding itself from considering the evidence that MM were prescribed sertraline 16 days after DWP’s decision.
7. The FTT also wrote in the Statement of Reasons that it noted the focus of the PIP2 questionnaire was on problems caused by colitis. It wrote that as the main issue related to this, and in accordance with the recent guidance from the Senior President of Tribunals, it would only deal with the restrictions caused by that condition. This was likely to refer to paragraph 6 of the Practice Direction from the Senior President of Tribunals: Reasons for decisions (issued 04 June 2024). However, it appears from the mandatory reconsideration request DWP recorded on 27 September 2023 and MM’s telephone call to DWP on 10 October 2023 that she told DWP she had mental health difficulties which caused her functional limitations (page C of Response). This suggests this was one of the main issues in dispute between MM and DWP. If the FTT interpreted the Practice Statement as meaning it did not need to address the evidence MM had provided about her mental health because this was not a main issue in the appeal, this may have been an error of law.

The Secretary of State’s submissions

8. Ms Coleman is the Secretary of State’s representative in these proceedings. She has provided a helpful written submission dated 10 February 2025. Ms Coleman supports the appeal and invites the Upper Tribunal to set aside the FTT’s decision dated 14 March for containing material errors of law, for the reasons set out below.
9. Process by which the FTT determined MM’s appeal on the papers and explained this part of its decision: Ms Coleman observes that the Upper Tribunal confirmed in **DT v SSWP (UC) [2019]** UKUT 268 (AAC) and **in MM**

v SSWP (ESA) [2011] UKUT 334 (AAC) that the Tribunal must acknowledge explicitly that it has considered both whether the parties have consented to a decision being made without a hearing *and* that it can fairly decide the appeal without holding one, and to explain why.

10. Ms Coleman observes the FTT confirmed in the Statement of Reasons that MM had asked the FTT to proceed in her absence. The FTT wrote that it considered the requirements of rules 2 and 27 of the FTT Rules 2008 and had sufficient evidence and was satisfied that it was able to decide the case in this way.
11. Ms Coleman refers to the matters set out at paragraph 4(a) to (c) above, as examples of matters the FTT did not address in its Statement of Reasons. The FTT did not explain whether it had considered inviting MM to an oral hearing given what she had written in the additional information section of her SSCS1 form, or why it decided not to do so. Ms Coleman submits that as the FTT had questions about MM's credibility and found inconsistencies in the evidence provided in the documents, it could have used its inquisitorial duty to explore these points further with MM. The FTT failed to explain why it decided it was fair and just to decide the appeal on the papers without adjourning to allow MM the opportunity to answer those points.
12. Ms Coleman argues that given the case law and what the FTT wrote in its Statement of Reasons, the FTT failed to explain adequately why it was fair and just to determine the appeal on the papers. Ms Coleman submits that merely referring to the overriding objective in rule 2 is not sufficient, if obvious factors point away from determining an appeal on the papers. She argues that as a result, the FTT made a material error of law in failing to explain adequately why it determined it fair and just to decide MM's appeal on the paper evidence alone.
13. Adequacy of evaluation of MM's mental health: Ms Coleman agrees with the matters set out at paragraphs 5 to 7 above. She submits there is a distinct lack of reference in the Statement of Reasons to MM's mental health difficulties. Ms Coleman argues this is particularly the case, given that when she requested mandatory reconsideration, MM stated she was receiving medication for stress and anxiety.
14. Ms Coleman observes MM's mental health problems were also indicated in the PIP2 questionnaire where she wrote that her GP considered her gastric problems were likely to be related to stress and referred to the murder of a family member over 30 years earlier that was still affecting her in trying to secure a conviction against the perpetrator (page 39 of FTT bundle). In the same document, MM referred to taking beta blockers to manage panic attacks linked to anxiety when out in public and said her anxiety had caused her to leave her employment. Ms Coleman submits the FTT has failed to engage with this evidence.

15. Ms Coleman submits that the FTT appears to have discounted the fact that MM's mental health required sertraline to be prescribed 16 days after DWP's decision, on the basis that:

"12. The appellant does not have any mental health or sensory issues. She had reported that after the respondent's decision she was put on 50mg of Sertraline for her mental health. However, as this is after the decision, the tribunal cannot take it into account."

16. Ms Coleman submits that given MM must have been suffering from her mental health difficulties at the date of her claim (see for example, paragraph 14) above, and the prescription date was during the required period, it is unclear why the FTT dismissed MM's evidence of being prescribed sertraline. Ms Coleman submits this is a further error of law.
17. Ms Coleman observes the FTT has cited guidance from the Senior President of Tribunals to support its position that it only needed to focus on MM's colitis. Ms Coleman acknowledges the relevant Practice Direction refers to written reasons only needing to refer to the main issues and evidence in dispute and explain how those issues essential to the FTT's conclusion have been resolved (paragraph 6 of guidance).
18. Ms Coleman submits, however, that MM made DWP aware in her mandatory reconsideration request that she had mental health difficulties, and advised DWP of this in a telephone call on 27 October 2023 (page C of FTT appeal bundle). Ms Coleman submits that the Senior President of Tribunal's Practice Direction does not provide support for the FTT to only focus on MM's physical conditions in its written reasons. Ms Coleman submits that the FTT has not mentioned in the Statement of Reasons that it considered MM's mental health difficulties and made a material error of law in applying the Practice Direction incorrectly to her circumstances.
19. Ms Coleman also submits that the FTT has failed to give adequate reasons for why it did not accept parts of MM's evidence and the medical evidence that demonstrated the long-standing nature of her health conditions (including her mental health).
20. MM has not replied to Ms Coleman's submissions, although the Upper Tribunal office has contacted her by email on a number of occasions.

Why there was no oral hearing of this appeal

21. Neither party requested an oral hearing of MM's appeal. Given this and given the Secretary of State supports this appeal, I decided an oral hearing is not required. Listing a hearing before the Upper Tribunal would simply add delay in reaching a position where both parties consider a new decision need to be made by the FTT about MM's appeal. I decided it was proportionate to determine the appeal on the papers.

22. There has been a delay in this appeal being referred back to me for final decision. On behalf of the Upper Tribunal, I apologise to both parties for this and the impact on them of having to wait for this decision.

My decision

23. At the permission stage, I only needed to be persuaded that it was arguable with a realistic (as opposed to fanciful) prospect of success that the FTT had made an error of law in a way that was material.
24. At this substantive stage, I need to be satisfied on the balance of probabilities that the FTT did make an error or errors of law that were material.
25. I am satisfied on the balance of probabilities that the FTT made material errors of law in relation to the appeal grounds addressed by Ms Coleman at paragraphs 9 to 19 above (and in more detail in her submissions dated 10 February 2025).
26. I would add the following observations.
27. The wording in rule 27(1) of the FTT Rules 2008 emphasises that the FTT must hold a hearing before making a decision disposing of proceedings unless satisfied of the matters in rule 27(1)(a) and (b).
28. In ***MH v Pembrokeshire CC [2010]*** UKUT 28 (AAC), Upper Tribunal Judge Jacobs identified a three-stage process for a First-tier Tribunal considering determining an appeal on the papers under rules 2 and 27 of the FTT Rules 2008. A broad summary of the stages involved is:
- (a) Stage one: a case is put before the FTT for consideration on the papers and without the parties. It is done on the basis no party has asked for an oral hearing. This is probably done by a clerk to the Tribunal without judicial consideration;
 - (b) Stage two: at the start of the FTT's consideration, it must be satisfied that no one has asked for an oral hearing. This is a condition of exercising the power to decide the appeal on the papers. If this has not been satisfied, the FTT must adjourn and direct an oral hearing. This is a judicial decision under rule 27(1)(a). It does not involve applying the overriding objective because the condition has either been satisfied or it has not; and
 - (c) Stage three: this occurs when the FTT has considered the case. It must then decide whether to decide it or to adjourn it. The adjournment might be for an oral hearing or to direct for further evidence from any party. If an oral hearing is directed, this is a judicial decision under rule 27(1)(b). If the case is adjourned with directions, this is a judicial decision under rule 5(3)(h). In either case the decision must be made in light of the overriding objective (in rule 2).
29. The HM Courts and Tribunals Service uses an online appeals system for social security appeals called Judicial Case Manager ("JCM") / Core Case

Data ("CCD"). The system contains, at the tab headed "Notifications", a chronology of the contacts HM Courts and Tribunals Service has made with the parties to an appeal that is proceeding on JCM. Each entry in the chronology also has "radio button" which, if pressed, will open up in a new online webpage, a copy of the specific notification and its wording.

30. The JCM system therefore provides a record of the notifications sent to parties. An FTT can access this record, either through its clerk, or via the tribunal panel members themselves. The FTT can therefore see which notifications have been sent out, and the specific wording they have used, in respect of an individual appeal.
31. HMCTS sent MM a notification on 17 January 2024, by email, to the email address MM had used when lodging her appeal. The bottom of the notification confirmed it was an automatically generated message (and stated MM could not reply to it).
32. The notification dated 17 January 2024 provided several pieces of information:
 - (a) It notified MM that DWP had sent a Response to her appeal and she would receive this in the post from DWP directly;
 - (b) It explained MM could comment on DWP's response if she wanted, and how this could be done online. It also explained how she could reply by post using a document cover sheet that HMCTS stated had previously been sent to her;
 - (c) It explained that what would happen next was that a Tribunal panel would consider MM's appeal and decide it on the papers, because she had told HMCTS she did not want to attend a hearing; and
 - (d) It also explained that MM would receive her decision through the post and HMCTS could not say how long it would take
33. After giving the explanation about receiving the decision by post, the notification stated:

"If you decide that you want to attend your hearing after reading DWP's Response then phone the number at the bottom of this letter. You can also request a hearing by telephone by phoning the number below. You will need to provide reasons why you need a telephone hearing."

34. This wording suggests that only two types of hearing are available – a hearing attended in person at a venue and a telephone hearing. There is no mention of a video hearing, even though it is one of the types of hearing a person could request. To request *any* oral hearing, MM would have to telephone a specific phone number given at the bottom of the notification.
35. Turning to what is required to request a remote hearing, MM would have to meet two additional conditions. These were in the wording of the notification; (a) an appellant *will need* to provide reasons and (b) explain *why they need* a telephone hearing.

36. This should be contrasted with the wording of the SSCS1 online appeal form used to lodge an appeal. This invites the person to tick boxes in the online form confirming whether they want to attend a hearing and if so, whether they would be willing for it to be by telephone, video or face to face. I am aware from experience in the First-tier Tribunal that an appellant can tick one, some, or all of the oral hearing options in the form. It does not require the person to justify any of the options they select.
37. If an appellant initially asks for their FTT appeal to be decided on the papers, changes their mind and then asks for a remote hearing, it is not immediately clear why they are required to meet the additional conditions described at paragraph 35 above. Nor is it immediately clear why the appellant is required to telephone DWP to request an oral hearing (rather than request this by email or post), or why a telephone hearing is the only remote hearing option described as available to request.
38. These additional requirements are imposed at the point where the appellant will have received, or will shortly receive, the appeal bundle from DWP. This bundle may contain documents the appellant has never seen before, such as the report of the PIP medical assessment. Some appellants may change their mind about having a paper determination of their appeal at that point. Those appellants will need to jump through the procedural hoops described at paragraphs 34 and 35 above. They will also not be told that a video hearing could be arranged instead.
39. Since this relates to HMCTS's process, neither MM nor DWP would be in a position to address these matters, and I have not asked the parties to comment on them specifically.
40. Where does this leave the First-tier Tribunal asked to consider determining an appeal on the papers? None of what I have written above should be taken to limit, in any way, the panel's discretion (which it exercises collectively) about how to make the judicial decision whether to proceed to determine an appeal on the papers.
41. The requirement is that the FTT applies the law correctly, takes into account relevant matters, does not take account of irrelevant ones, makes appropriate factual findings and explains, in adequate terms, the decision that it takes. Explaining why the FTT determined an appeal on the papers does not need to be a lengthy explanation. However, the requirement of adequacy means the FTT must engage with the information and evidence before it.
42. In MM's case, doing so meant addressing a clear statement from MM at the outset that she would be willing to take part in a video hearing, and the FTT's own concerns about whether some of the written evidence was consistent with what she was arguing. The FTT needed to address why, in this context, it considered it fair and just to decide MM's appeal on the papers. Furthermore, the wording of the automatic notification from HMCTS dated 17

January 2024 was also part of the factual matrix in MM's case. It was contained in the JCM appeals system and available for the FTT to view, even if HMCTS had not included it in the appeal bundle stitched for the FTT. There are other parts of the JCM system where an FTT may also need to look for relevant information not contained in the bundle, for example, in the tab headed "Notepad".

43. It took some time exploring HMCTS's JCM system for me to find the automatic notifications that were sent to MM for her appeal. When a First-tier Tribunal sits, it is busy, it has a lot of matters to resolve, and it does not have the luxury of exploring the system in the same way that I was able to do. I am therefore arranging for a copy of this decision to be published on the Upper Tribunal's website as well as the National Archives. This is in case it is useful to First-tier Tribunals in future cases where the wording of automatic notifications may be important to what they need to consider.

Conclusion, including disposal

44. I have decided the FTT's decision involved material errors of law. I have decided to use my discretion to set aside the FTT's decision dated 14 March 2024. I do so, using the legal power in section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Section 12 of the 2007 Act requires me either to remit (send back) the case to the First-tier Tribunal to decide afresh, or to decide the case myself.
45. Neither party has specifically asked me to remake the decision. In any event, this is an appeal where further facts need to be found, and the FTT is best positioned to make them, given it will include the expertise from a medically qualified member and a disability qualified member. The First-tier Tribunal, with its medical and disability expertise, is better placed than an Upper Tribunal Judge, to evaluate all the evidence in this appeal and to make appropriate findings of fact.
46. I therefore remit MM's appeal to be reheard before a new First-tier Tribunal. It will make a fresh decision about whether she should be entitled to PIP.
47. Although I have set aside the FTT's decision dated 14 March 2024, I am not making any findings, or expressing any view, about whether MM should be entitled to PIP. The next First-tier Tribunal will need to hear evidence, make its own findings of fact, and provide its reasoning for the decision it reaches.

Judith Butler
Upper Tribunal Judge

Authorised by the Judge for issue: 08 December 2025