

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**PERSONAL INDEPENDENCE PAYMENT**

Application by the claimant for leave to appeal  
and appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 5 March 2020

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference BE/4198/18/03/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.
3. I direct the applicant to make urgent efforts to secure representation for the new appeal hearing and, if he is unsuccessful in those efforts, to attend in any event. He should be aware that, if he does not attend a hearing on a future occasion, the tribunal may, having regard to all the circumstances, including any explanation he has offered for his absence, proceed with the hearing in his absence.

**REASONS**

**Background**

4. This appeal addresses the jurisdiction of the Social Security Commissioner to oversee the exercise of judicial discretion by a legally qualified member of the tribunal, or by the tribunal as a whole.
5. The appellant had previously been awarded disability living allowance (DLA) from 29 April 2014, most recently at the high rate of the mobility component and the middle rate of the care component. As his award of

DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he claimed personal independence payment (PIP) from the Department for Communities (the Department) from 28 November 2017, on the basis of needs arising from type 2 diabetes, angina, depression, shortness of breath when walking, and neck, shoulder and back problems.

6. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and he returned this to the Department on 28 December 2017. He asked for evidence relating to his previous DLA claim to be considered. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 15 February 2018. On 15 March 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 28 November 2017. The appellant requested a reconsideration of the decision. He was notified that the decision had been reconsidered by the Department but not revised. He appealed.
7. The appeal was first listed for hearing on 3 October 2018, when the appellant attended along with a friend, but he requested an adjournment to obtain representation. The hearing was next listed for hearing on 17 April 2019. By a letter received on 16 April 2019, and by telephone, the appellant sought postponement on the basis that his case had not yet been looked at by Citizens Advice and his friend who helped him get to Belfast (from Larne) was unavailable. The postponement application was not addressed prior to hearing, but the oral hearing was adjourned by the tribunal, along with a direction that the appellant should obtain his general practitioner notes and records and bring these to the next hearing. Despite its specific direction on the evidence to be submitted, the particular panel directed that the appeal should be relisted before any panel. The appellant's case was next listed for hearing on 14 October 2019. However, he again sought postponement on the basis that he had not obtained representation. Postponement was granted. The hearing was next listed for 5 March 2020. The appellant sought a postponement on the basis that Citizens Advice could not represent him at this time. Postponement was refused by the LQM.
8. The appeal was considered on 5 March 2020 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal proceeded in the absence of the appellant and disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 10 May 2020. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 15 September 2020. On 13 October 2020 the appellant applied to a Social Security Commissioner for leave to appeal.

## **Grounds**

9. The appellant submits that the tribunal has erred in law by proceeding to determine his appeal in his absence, challenging aspects of the evidence against him and indicating some of his functional limitations arising from mental health problems.
10. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson submitted that the tribunal had not materially erred in law. She indicated that the Department did not support the application.

## **The tribunal's decision**

11. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the PIP2 questionnaire completed by the appellant, a general practitioner factual report and a consultation report from the HCP. The appellant did not attend. The tribunal noted that this was the fourth time of listing for hearing, that the decision appealed was almost 2 years old, that he had still not arranged representation despite adjournments and postponements to allow him to do so, and that he had not provided medical evidence "despite an adjournment for this". The tribunal decided to proceed in the absence of the appellant. The Department was not represented.
12. The tribunal accepted that the appellant suffered from depression, being prescribed 50mg Sertraline daily. It addressed the daily living activities, finding in particular that he did not require prompting or encouragement to perform tasks due to his mental condition. It accepted that he had relevant physical limitations getting in and out of a bath, due to obesity, awarding points for descriptor 4.b, and similarly for dressing/undressing awarding points for descriptor 6.b – a total of 4 points for daily living. As he did not reach the threshold for an award of daily living component, the tribunal disallowed this aspect of the appeal.
13. It declined to accept the submissions of the appellant that he did not go out alone and could not use public transport, finding that he did not have a disabling level of anxiety on the basis of his (lack of) medical treatment. It accepted that, due to angina, high blood pressure, back pain and obesity, the appellant would have some limitations relevant to mobility activity 2. It agreed with the HCP that that he was restricted to moving 50-200 metres, finding that he can manage this activity unaided, safely, repeatedly, to an acceptable standard and in a reasonable time on the majority of days, awarding 4 points for activity 2.b. As he did not reach the threshold for an award of mobility component, the tribunal disallowed this aspect of the appeal.

## Relevant legislation

14. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.
15. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a claimant who obtains a score of 12 points will be awarded the enhanced rate of that component.
16. This appeal does not concern the application of the rules of entitlement to PIP so much as the general provisions governing the business of tribunals. These are the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). In relation to the conduct of tribunal hearings, these provide for the non-attendance of a party to the appeal at regulation 49(4) which reads:

“(4) If a party to whom notice has been given under paragraph (2) fails to appear at the hearing, the chairman or, in the case of a tribunal which has only one member, that member, may, having regard to all the circumstances including any explanation offered for the absence, proceed with the hearing notwithstanding his absence, or give such directions with a view to the determination of the appeal as he may think proper”.

## Submissions

17. The appellant submits that the tribunal erred in law by failing to give him an opportunity to attend the appeal hearing, and in this context takes issues with some evidence that was before the tribunal.
18. Ms Patterson for the Department set out regulation 49(4) above. She outlined the Upper Tribunal Decision of Judge Poynter in *BV v Secretary of State for Work and Pensions* [2018] UKUT 444. This concerned rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, which provides that the tribunal may proceed with the hearing if, being satisfied that the party has been notified of the hearing, it considers that it is in the interests of justice to proceed.
19. From *BV v SSWP* she drew the principle that it was incumbent on a tribunal to explain why it was in the interests of justice to proceed with a hearing

where a party fails to attend. She submitted that the tribunal had done this and that it had not acted unfairly. She noted that the appellant's specific complaint about the evidence of the HCP had been addressed by the tribunal and submitted that this had been deal with adequately.

### **Assessment**

20. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
21. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
22. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
23. The main issue in this appeal is a simple one. In short, the appellant had requested postponement of his appeal. Rather than grant this, the tribunal exercised its discretion to proceed in his absence under regulation 49(4) of the Decisions and Appeals Regulations. The question which arises is whether the tribunal was entitled to exercise its discretion on the way that it did as a matter of law.

#### *The Upper Tribunal case law*

24. Ms Patterson for the Department submitted that the tribunal was entitled to proceed. In her analysis of the relevant law, she relied on the Great Britain Upper Tribunal case of *BV v Secretary of State for Work and Pensions*, a decision of Judge Poynter. In *BV v SSWP* the appellant had told the tribunal that she was unable to attend a hearing due to a conflicting appointment. However, the tribunal refused a postponement, noting that the appellant did not say what the conflicting appointment was for and why she considered it more important than her appeal. It considered that it had sufficient evidence to determine, and proceeded to determine, the appeal in her absence. It transpired later that the conflicting appointment was for a diagnostic assessment in relation to the possibility that the appellant was suffering from cancer, which was confirmed and which was later assessed as terminal.
25. In his discussion of the principles applying to the decision to proceed with the appeal in the appellant's absence in Great Britain, Judge Poynter had regard to the Tribunal Procedure (First-tier Procedure) (Social Entitlement Chamber) Rules 2008 (the First-tier Tribunal Rules), and rule 31 in particular. This is a roughly equivalent provision to regulation 49(4). It

provides that, if a party fails to attend a hearing, if the tribunal is satisfied that reasonable steps were taken to notify the party of the hearing, and it considers that it is in the interest of justice to proceed with the hearing, it may so proceed.

26. Ms Patterson submits that the same principles apply to tribunals in Northern Ireland and that it is therefore incumbent on a tribunal to explain why it was in the interests of justice to continue with a hearing in a situation where a party fails to attend. However, she submits that the present tribunal has done so, by emphasising the age of the decision under appeal and appellant's failure to actively pursue the appeal by attending and providing further evidence.
27. However, I must reject Ms Patterson's submission. In *BV v SSWP*, Judge Poynter was addressing the powers and duties of an entirely different statutory tribunal – the Social Entitlement Chamber of the Great Britain First-tier Tribunal. He observed that the relevant consideration before the tribunal could proceed was not whether it had sufficient evidence to make a decision in the appellant's absence, but whether it was in the interests of justice to proceed. The interests of justice consideration was derived entirely from rule 31(b) of the First-tier Tribunal Rules.
28. Judge Poynter further noted that the tribunal had express regard to the overriding objective, which appears at rule 2 of the First-tier Tribunal Rules. The overriding objective is to enable the tribunal to deal with cases fairly and justly. This involves dealing with it in a manner:
  - (a) proportionate to its importance, complexity and to its costs and the parties' resources;
  - (b) which avoids formality and is flexible;
  - (c) which ensures that the parties are able to participate fully;
  - (d) which uses the expertise of the tribunal effectively; and
  - (e) which avoids delay so far as compatible with the proper consideration of the issues.
29. The Great Britain First-tier Tribunal is required to seek to give effect to the overriding objective when exercising powers and interpreting the rules. However, whereas some tribunals and courts in Northern Ireland have a similar overriding objective in their rules, (notably in the Rules of the Court of Judicature and the Industrial Tribunal and the Fair Employment Tribunal Constitution and Rules of Procedure), social security tribunals in Northern Ireland do not.
30. Social security tribunals in Northern Ireland presently derive their existence from the Social Security (NI) Order 1998 and are entirely a creature of statute. They draw their powers from the Decisions and Appeals

Regulations, which are made under the authority of that Order (and some older child support and social security statutes). I cannot simply infer that particular Great Britain tribunal rules apply to them when, as a matter of law, they do not. I therefore reject Ms Patterson's submission, which is based *BV v SSWP*, not because I disagree with the principle of having regard to the interests of justice as such. Rather I must reject it as it is grounded on the application of an express rule of a different statutory tribunal that has no jurisdiction in Northern Ireland. This rule in turn is subject to an overriding objective, that does not formally apply to social security tribunals in Northern Ireland. In order to find relevant legal principles, therefore, I consider that I must look elsewhere.

*Relevant principles affecting the LQM's exercise of discretion*

31. The LQM of the tribunal clearly had power to proceed in the absence of the appellant, under regulation 49(4), set out above. However, before exercising that power, the LQM was under an obligation to have regard to all the circumstances, including any explanation offered for the absence. The decision to proceed with the hearing notwithstanding the absence of the appellant was an exercise of judicial discretion. I consider that an LQM is granted a significant margin of appreciation by regulation 49(4). However, there must also be some constraints on the exercise of discretion by an LQM or tribunal to avoid error or abuse.
32. Considering the exercise of discretion within the jurisdiction of the courts, I note that specific principles can be found. It seems to me that on a prospective appeal from a tribunal on point of law to a Social Security Commissioner, the same principles should be applied as apply to an appeal from exercise of judicial discretion in the civil courts.
33. Turning to relevant case law regarding appeals from discretionary judicial decisions, I observe that Stephens J, as he then was, said in the High Court in *Jordan, Re Judicial Review* [2014] NIQB 11:

“The domestic law in relation to appeals in civil trials is straightforward. It has long been recognised that an appeal will not be entertained from an order which it was within the discretion of a judge to make, unless it be shown that he exercised his discretion under a mistake of law (*Evans v Bartlam* [1937] AC 473) or in disregard of principle (*Young v Thomas* [1892] 2 Ch 134) or under a misapprehension as to the facts or that he took into account irrelevant matters (*Egerton v Jones* [1939] 3 All ER 889 at 892) or the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible" (*G v G* [1985] 1 WLR 647)”.

34. Albeit given in the context of criminal proceedings, I further observe the similar remarks of Carswell LCJ in the Court of Appeal in *R v McKeown*

[1999] NICA 12, in turn citing Lowry LCJ in *R v O'Halloran* [1979] NI 45 at 47:

“... ”

"An appellate court's approach to the exercise of a judicial discretion must always be to look for indications that the judge misconceived the facts, misstated the law or took into or left out of account something which he ought to have disregarded or regarded, as the case may be."

We think that these principles should be read subject to the qualification that even though none of the criteria may be strictly satisfied, if the appellate court comes to the conclusion that the judge's decision will result in injustice being done, it has both the power and the duty to remedy it”.

35. I particularly note that the latter comment, while given in the context of a criminal case, echoes to a significant degree the rule applied by Upper Tribunal Judge Poynter in *BV v SSWP*, as relied upon by Ms Patterson. Although stated in *R v McKeown* in the context of criminal law, I think that it is an uncontroversial premise that the principle of avoiding injustice applies to all courts and tribunals.
36. I did not accept Ms Patterson's submission on the interests of justice, grounded as it was on Upper Tribunal jurisprudence applying specific Great Britain rules. It nevertheless appears to me that a similar principle should be applied in social security tribunals, grounded on the decisions of the High Court and the Court of Appeal in Northern Ireland. Derived from the decisions of the Northern Ireland courts, I adduce the following principles as relevant when reviewing the exercise of a tribunal's or LQM's discretion.
37. In the exercise of supervisory jurisdiction over the decision of a tribunal that has involved the exercise of judicial discretion, it seems to me that the Commissioner must decide whether the LQM or tribunal:
  - (i) made a mistake in law or disregarded principle;
  - (ii) misunderstood the facts;
  - (iii) took into account irrelevant matters or disregarded relevant matters;
  - (iv) reached a decision that was outside the bounds of reasonable decision making;
  - (v) gave rise to injustice.



*The application of those principles to the present tribunal's exercise of discretion*

38. Turning to the facts of the present case, it can be seen that the tribunal has exercised its discretion to proceed in the absence of the appellant for five stated reasons:
- the appeal had been listed for hearing four times in total;
  - the decision under appeal was made two years previously;
  - the appellant had not yet obtained representation despite being granted previous postponement or adjournment for that purpose;
  - the appellant had “failed to provide any additional medical evidence despite an adjournment for this”;
  - the appellant had not shown any reasonable excuse for not pursuing his appeal and for non-attendance on the day.
39. The issue of the weight to be given to the number of previous listings of a case for hearing was addressed by a Tribunal of Commissioners in *SG v DSD* [2013] NI Com 12. That case was different from the present one, in that the appellant’s postponement application had not been communicated to the tribunal. At paragraph 53, the Tribunal of Commissioners said:
- “..., the simple fact of the hearing being postponed or adjourned on a number of prior occasions is not in itself a factor which can legitimately affect a decision on an adjournment application. A decision-maker can legitimately assume that each past adjournment or postponement decision was properly made. On the other hand, the reasons for those past postponements or adjournments are a factor which can and should be taken into account when considering the reason for the present application. Where the reason for the current application is improperly understood, any resulting decision is likely to be tainted”.
40. Whereas the present tribunal indicated that the number of previous postponements was a factor that it took into account, it can be seen that it also gave consideration to the reasons for previous postponements. The appellant had said that he was seeking representation, but this had been the case for rather a long time. This was certainly a valid factor for the LQM to take into account.
41. However, it must also be recognised that obtaining representation was not a matter entirely within the appellant’s control. The tribunal did not have any regard to the availability of representation and the difficulty of obtaining

a representative in the area where he lived. The tribunal did not address itself to the particular appellant's need for representation or whether his circumstances suggested that he would reasonably require it.

42. It can also be seen that the tribunal placed weight on the ongoing duration of the proceedings. The decision under appeal had been made on 15 March 2018. The present tribunal convened on 5 March 2020 and was clearly exercised by the passage of time, recording in upper case letters that the decision appealed was "ALMOST TWO YEARS AGO". However, it is not clear to me why that should be a relevant factor *per se*. It appears to me that, where there have been valid adjournments and postponements in the past, as here, these will in themselves add to the duration of a case from appeal to conclusion. There is no fault involved. It simply is what it is.
43. Furthermore, the use of the upper case characters suggests almost a level of outrage by the tribunal. However, at the end of the day, the person most invested in the appeal is the appellant. The appellant has initiated the proceedings and, if the appellant is prepared to wait for two years for the appeal to be heard in his preferred circumstances, it is difficult to see why the tribunal should have any objection. It is true that public money may be wasted in circumstances where a hearing is convened and does not proceed where the appellant does not attend. However, it was the appellant who sought to avoid that eventuality by seeking postponement and it was the tribunal who refused his application.
44. It is of course entirely possible that an appellant may simply be using procedural tactics to delay proceedings for advantage in some cases. The obvious category that springs to mind is overpayment appeals, where the appeal pauses recovery of an overpayment of benefit. In such a case, I consider that a tribunal is entitled to examine the motives of an appellant more closely. However, this is an appeal from the disallowance of an initial PIP claim. I am not aware of any tactical advantage to the particular appellant in delaying his appeal, understanding that his DLA entitlement stopped in 17 April 2018, and none was identified by the tribunal.
45. Another factor that may be relevant arises from Article 13(8)(b) of the Order. This provision precludes tribunals from having regard to circumstances that were not obtaining at the time the decision was made. In this case, for example, the focus of the tribunal was on the circumstances up to March 2018. In general, the passage of time tends to lessen the value of the oral evidence of an appellant at a hearing. Due to Article 13(8)(b), the practice of social security tribunals is to indicate at the outset of a hearing that the law requires them to ask about how the appellant was at the date of decision. This can often result in perplexed reactions, as it can be very difficult for appellants – in particular with progressively deteriorating conditions or with conditions that affect memory – to say exactly how they were at a past date. When such lengthy delays occur as in the present case, the reliability of oral evidence inevitably is affected. While delay *per se* is not a factor a tribunal is

required to have particular regard to, the impact of delay on the likely value of oral evidence is clearly a relevant consideration. However, I observe that proceeding in the absence of the appellant would render this an academic consideration, since by definition there would be no oral evidence given at all.

46. With social security tribunals, as indicated above, there is no overriding objective in the Decisions and Appeals Regulations that would make the avoidance of delay a particularly relevant factor. As I observed in *RB-v-Department for Communities* [2021] NI Com 5, and as noted above, the modernisation of tribunal procedure rules has not been undertaken in Northern Ireland. The Decisions and Appeals Regulations in force in Northern Ireland obviously provide for the tribunal to proceed in the absence of a party, and this provision must have a purpose and effect. However, where there have been valid adjournments and postponements in the past, which themselves add to the duration of a case from appeal to concluding hearing, tribunals should be very cautious in finding delay *per se* – in the absence of other relevant considerations - to be a decisive factor.
47. I further observe that the tribunal noted that the appellant had not provided medical evidence despite an adjournment for this in April 2019. The adjournment of the hearing on that date was granted in the appellant's absence on the basis that a companion who helped him to get to Belfast from his home in Larne was not available that day. The LQM that adjourned the hearing on that date directed him to seek and obtain his GP notes and records and bring them to the next hearing.
48. I note that the earlier LQM further directed "relist before any panel". Past practice in the social security tribunal was that when an LQM gave a specific direction in relation to evidence or the conduct of the proceedings, this made the case a "special". This meant that it had to be listed before, and determined by, the same LQM. As I understood it, this was because the purpose of the LQM's direction would not necessarily be understood, or accepted, by another LQM. Judicial independence and the coherence of the proceedings was protected by the case going back to the same LQM who issued the direction as a "special".
49. Whatever the rights and wrongs of that procedure, the departure from it appears to have led to a misunderstanding in the present case. The direction from the earlier LQM was for the appellant to obtain and bring medical records with him to the next hearing. The present tribunal appears to have understood that the previous adjournment had been requested by the appellant in order for him to provide medical evidence. It says that he "failed to provide any additional medical evidence despite an adjournment for this", again emphasising in upper case letters that this was "ONE FULL YEAR AGO".
50. From a consideration of the record of proceedings of 17 April 2019, it is evident that the appellant did not seek an adjournment to provide medical

evidence. This was the initiative of the previously involved LQM. The present tribunal refers to his failure to provide medical evidence as if the appellant had requested adjournment for that purpose. This was to misunderstand the situation. In addition, if the production of evidence that had been directed by the earlier LQM was in any way important, it is difficult to see how the tribunal was content to proceed to determine the appeal without that direction being complied with.

51. The tribunal further considered that the appellant had not shown any reasonable excuse for not pursuing his appeal and for non-attendance on the day. The appellant had made a postponement application on the basis that Citizens Advice were unable to get him any representation at this time and that he felt that he would prefer them to be with him to represent him. As a matter of law, the refused postponement application still constituted grounds of adjournment on the hearing date (see paragraphs 42-43, *SG-v-Department for Social Development*).
52. The tribunal had to decide whether to proceed in the absence of the appellant. In doing so, the tribunal characterised the appellant's desire for representation as not a "reasonable excuse". However, this was to place an onus on the appellant to justify non-attendance, akin to cases where good cause has to be demonstrated for non-attendance at a medical examination arranged by the Department. The question for the tribunal was, having regard to all the circumstances including any explanation offered for the absence, whether it should exercise its discretion to proceed with the hearing, notwithstanding the absence of the appellant. The key issue that had been a thread through all the previous postponements was his desire to be represented. The tribunal, most notably, has not dealt with that issue at all.
53. For the reasons given above, I consider that I should grant leave to appeal.
54. It appears to me that the tribunal has incorrectly placed weight on the number of previous postponements and the resulting delay in the appeal. It also appears to me that the tribunal has misunderstood the circumstances of the previous adjournment for medical evidence. Most tellingly, it has not dealt with the question whether the appeal should not proceed in order for the appellant to make a final effect to secure representation.
55. I find that the tribunal has erred in law on these grounds and I allow the appeal. I direct that the appeal shall be referred to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

11 May 2021