IN THE UPPER TRIBUNAL **Case No.** CE/1015/2019
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made on 30 November 2018 at Manchester) involved the making of an error of law, it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

C. The tribunal must do its best to ensure the claimant is provided with a female interpreter who speaks either Bravanese or Swahili.

D. These directions may be supplemented by further directions made by a Tribunal Judge of the First-tier Tribunal in the Social Entitlement Chamber.

REASONS FOR DECISION

1. On 10 August 2017 a decision-maker acting on behalf of the Secretary of State decided that the claimant was not entitled to employment and support allowance (ESA) from that date. The decision was not altered after a mandatory reconsideration so the claimant appealed to the First-tier Tribunal (the tribunal).

2. The claimant has a limited ability to speak English. The documentation in front of me shows that she has taken an English for speakers of other languages (ESOL) course but does not show how she fared or what level of course she undertook. Her first language is Bravanese (sometimes called Barava) but she also speaks Swahili. Oddly, when the claimant lodged her appeal, whilst she asked for an oral hearing, she did not indicate a need for an interpreter. It appears that someone else completed the relevant appeal form on her behalf.

3. The appeal was listed for hearing on 21 August 2018. The parties were notified. However, it appears that whilst the tribunal panel members were discussing the various appeals it was due to hear that day, it was realised that the claimant would need an interpreter. Accordingly, she was contacted so that interpreter requirements could be verified and she was told that she need not attend as the appeal would be adjourned. The appeal was then listed for hearing on 10 October 2018. It is not entirely clear but it seems that she did not turn up because she had not received notification of the hearing albeit that the record shows

notification had been sent. It also looks as if no interpreter had attended either though I am not wholly certain as to that. Anyway, the tribunal proceeded in the absence of the claimant and dismissed her appeal but its decision was, in the circumstances, subsequently set aside.

4. The appeal was then scheduled to be heard on 30 November 2018. This time the claimant attended. She was accompanied by a friend. There was no interpreter. It is not clear to me whether that was because none had been booked due to an administrative failing, because no suitable interpreter was available, or because one had been booked but had simply not attended. Undaunted, the tribunal proceeded. It asked the claimant's friend if she would act as an interpreter and she said she would. It observed that the friend spoke "good" English. It also noted that the claimant had some English having attended the ESOL course. It is apparent that it thought, given the length of time it had taken to get this far, given what it thought might be the difficulties in finding an interpreter able to speak Bravanese, and given the willingness of the friend, it was appropriate to proceed. It is apparent though, from both the record of proceedings and its statement of reasons, that it did not do so lightly. Having heard the appeal, the tribunal dismissed it. An application for permission to appeal to the Upper Tribunal followed.

5. A District Tribunal Judge of the First-tier Tribunal granted permission to appeal. In a helpful and considered grant, it was suggested that there might have been unfairness caused by the tribunal's decision to proceed particularly in light of its seeming not to have made a proper inquiry into the friend's abilities in English. I directed submissions from the parties. The Secretary of State's representative argued that the key question was whether or not the claimant had received a fair hearing. She drew my attention to the decision of the Upper Tribunal in *ZO v SSWP (IB)* [2010] UKUT 143 (AAC). In that case, things were the other way round in that a tribunal faced with there being no interpreter but a family member who was willing to interpret had declined to proceed (inflexibly it was subsequently decided) and had adjourned with a view to an interpreter being booked for a reconvened hearing. But that hearing had not taken place because the claimant had decided, in the face of earlier delays, that she could not face another hearing and had asked that the appeal be decided on the papers which it then was. She lost but the Upper Tribunal then set aside that decision.

6. The Upper Tribunal noted in *ZO* that a claimant has a right to a fair hearing under article 6 of the European Convention on Human Rights and that a fair hearing would normally be one in which the claimant was able to participate albeit that there was no rule to the effect that a tribunal would always be required to adjourn for an official interpreter. But it was also pointed out that it is preferable to have an independent interpreter. Indeed, that must be right. Not having such an interpreter runs the risk of inadequate interpretation and hence unfairness to one or the other party or conceivably even both. That might be because of an unofficial interpreter (who I suppose would typically though not necessarily be a friend or family member of a claimant) being unfamiliar with the rigours and discipline of the task, being less than fluent in the claimant's first language or in English, or even being partial in the undertaking of the task.

7. So, it seems to me (without intending to lay down any guidelines since I am not required to do so in deciding this appeal) that a tribunal should only proceed through the utilisation of an unofficial interpreter with considerable caution. But I respectfully agree with what was said in *ZO* to the effect that there will be rare occasions, I would think very rare, when such would be appropriate. That might be, for example, where a claimant is anxious to

proceed, there have been previous substantial delays, and there is a person willing and able to perform the task who has the confidence of the tribunal. There might also be extreme cases where it is simply not possible to secure, with reasonable or even more than reasonable diligence, an official interpreter due to the scarcity of people who speak the language required and there is no suitable alternative language spoken by the claimant.

8. Turning once again to the circumstances in this case, I note in passing that although the tribunal observed that Bravanese is a "relatively unusual first language", it did not seem to consider whether the same might be said of the alternative language of Swahili. In my experience there is not a significant shortage of Swahili speaking interpreters though my knowledge may be out of date. Further, it is not clear to me on the material before me, that the previous adjournments had been due to the unavailability of Bravanese speaking interpreters though the tribunal did seem to proceed on the basis that it had been. So, adjourning either for a Bravanese speaking interpreter or a Swahili speaking interpreter might well not have been hopeless.

9. I do accept that the record of proceedings and the statement of reasons, when read together, seem to suggest that the tribunal was able to elicit useful information from the claimant through the method it chose. I am not clear, though, whether the information was primarily obtained via the friend acting as interpreter or via the claimant speaking limited English. But it seems likely it was, for the most part at least, the former rather than the latter. That gives rise to concerns because there is nothing in the material before me, and no statement to this effect in the statement of reasons, to show that the tribunal explained to the friend what would be expected of her if she was to act as interpreter and, in particular, that she would be expected to simply translate the questions accurately and relay the answers given in a similar manner without, for example, adding anything in based on her own knowledge of the claimant. It does seem to me that, unless an informal interpreter obviously has that knowledge anyway, a tribunal ought, as a minimum, to take such a step and to form an impression as to whether what is required has been understood and whether the unofficial interpreter is likely to be able to meet the requirements. Any relevant exchanges should be noted in the record of proceedings and the fact a brief assessment of that type has been carried out should be recorded in any statement of reasons subsequently written along with an explanation as to why it is thought that a friend or other informal interpreter is able to fulfil the task and has the requisite language skills in both English and the language to be used by the claimant. This tribunal did not do that.

10. It may be that, on this occasion, matters worked well. Certainly, there seems no reason to think that the friend was partial. Further, it is difficult to criticise a tribunal for simply trying to get on with its job and I do not intend this decision to be regarded as a criticism at all. But what has been left unsaid means, in my judgment, it has not been shown that the friend was instructed how to undertake the task correctly and did do so (though she might have done) such that the accuracy of interpretation of the questions and the answers can safely be relied upon. Nor has it been shown that the tribunal properly asked itself and satisfied itself that she was up to the task (though I accept she might have been). I have, therefore, albeit with some regret, decided that the tribunal did err in law through not properly satisfying itself the friend knew the task she needed to perform or at least through not demonstrating that it did so. I consider the error to be material because it is possible that, had there been an official interpreter, the tribunal's understanding of the claimant's evidence might (I do not say would) have been different.

11. The above explains why I have decided to set aside the tribunal's decision. I have also decided to remit. The basis for my setting aside the decision means that it is appropriate for there to be a complete rehearing.

12. I have, it will be seen, directed the tribunal to do its best to obtain the services of a female Bravanese or Swahili interpreter. I have put it in those terms in case it proves very difficult to find one. But as will be realised from what I have already said, I would be quite optimistic with respect to Swahili though I do note that the claimant would prefer Bravanese should that be possible.

13. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **21 August 2019**