



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No. CPIP/2401/2019**

**Before**            **Thomas Church, Judge of the Upper Tribunal**

**Decision:**        The decision of the First-tier Tribunal (which it made at Fox Court on 02 May 2019 under reference SC242/18/12293) involved the making of an error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit it to the First-tier Tribunal for rehearing before a differently constituted panel.

**DIRECTIONS FOR THE REHEARING:**

- A. The First-tier 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 First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 02 May 2019.
- C. Copies of this decision should be included in the appeal bundle before the panel of the First-tier Tribunal dealing with the remitted appeal.
- D. In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: *R(DLA)* 2 & 3/01.
- E. If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction D above).
- F. The First-tier 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 panel may reach the same or a different outcome from the previous panel.

**REASONS FOR DECISION**

**Background**

1. This is an appeal by the Appellant against a decision of the panel of the First-tier Tribunal which heard her appeal at Fox Court on 02 May 2019 (the "**Tribunal**") upholding the Secretary of State's decision that she was not entitled to any award of Personal Independence Payment. While the Secretary of State awarded no points in respect of the Appellant's ability to carry out the activities set out in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the "**PIP**")

**Regulations**”), the Tribunal decided that the Appellant scored a total of 7 points for the daily living activities and 4 points for the mobility activities (the “**FtT Decision**”). However, this was insufficient for her to qualify for any award of Personal Independence Payment.

2. The Appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. The First-tier Tribunal refused permission so the Appellant exercised her right to apply to the Upper Tribunal for permission to appeal. On 10 August 2020 I conducted an oral hearing by Skype of the permission application. At the hearing the Appellant was represented by Mr Matthew Hall of the London Irish Centre. The Respondent was not represented at the hearing.
3. I decided to grant permission to appeal. In my decision I said:

“8. Central to the Tribunal’s decision-making on the points the Appellant should be awarded in relation to mobility activity 2 was its finding of fact that the Appellant can move more than 50 metres but not more than 200 metres (to the standard required by the Social Security (Personal Independence Payment) Regulations 2013.

9. Mr Hall submitted that this finding was based on an erroneous assessment of the distance from the Appellant’s home to the shops was 310-390 metres. Mr Hall submitted that the distance was in fact 140 metres (with a gradient of 1.52%), and that this could be demonstrated by performing a google maps search. He maintained that the evidence of the google search fell within the class of evidence identified in *Ladd v Marshall* [1954] 1 WLR 1489 and that it could therefore be admitted in support of an appeal before the Upper Tribunal. He said that it was not the case that the fresh evidence “could have been obtained with reasonable diligence” for use at the hearing because plotting the precise distance in metres between an address and a (non-address) landmark, with details of incline, specifying that the journey was to be undertaken on foot, and placing the information in a readily understandable format for presentation in evidence involved considerable skill, and that such an exercise was not within the competence either of the Appellant or her previous advisers. In the alternative, he argued that the principles in *Ladd v Marshall* provide only the starting point for an assessment of whether new evidence should be admitted, and while the House of Lords said in *Al-Mehdawi v The Home Secretary* [1990] 1 AC 876 that failure of a party’s legal advisers to obtain evidence was not an “exceptional” circumstance such as to justify a departure from the *Ladd v Marshall* principles, the facts of this case can be distinguished from those in *Al-Mehdawi*. This was on the basis that the nature and quality of advice generally available to appellants, which is often from representatives with no formal training or qualifications and limited advocacy experience, differs materially from that available in immigration tribunals. He invoked the overriding objective in the Tribunal Procedure (Upper Tribunal) Rules 2008 and said that the new google evidence should be admitted to establish the mistake of fact for which he argues. Mr Hall argued that the four stage test for establishing that a mistake of fact amounts to an error of law set out by Carnwath LJ (as he then was) in *E v The Secretary of State for the Home Department* [2004] QB 1044 was satisfied, and he maintained that the error

was material. I am persuaded that this ground of appeal is arguable with a realistic (as opposed to fanciful) prospect of success.

10. I am further persuaded that even if the Tribunal did not make a mistake amounting to an error of law in relation to the distance between the Appellant's home and the shops to which she referred at her face to face assessment, it is arguable with a realistic prospect of success that it failed adequately to explain why it made the findings it did about her walking when, for example, her GP had said (in the letter at p.21-3 of the appeal bundle) that "asthma causes her to be breathless even on 20 yards walking.

11. I am satisfied that if the Tribunal made the errors that I have said that it might have made then those errors could have been material in the sense that the outcome of the appeal could have been different had they not been made. This justifies a grant of permission to appeal to the Upper Tribunal."

4. Mr Hall put forward further grounds of appeal, in relation to:
  - a. the Tribunal's apparent failure to consider what disadvantage the Appellant's mental health problems might place her at when it was considering whether to adjourn,
  - b. the Tribunal's failure to explain why it awarded no points under activity 8 given the evidence that the Appellant uses a magnifier and the fact that the Respondent's communications with the Appellant were in large print; and
  - c. the adequacy of its reasons relating to its assessment of the Appellant's ability to carry out tasks "safely" and her ability to cover the distances it said she could cover within "a reasonable time").
5. Since I had decided that it was arguable with a realistic prospect of success that the Tribunal made a material error of law as described in the paragraphs quoted in paragraph 3 above, I did not deal with these additional arguments in my permission decision, but I made my grant of permission on an unrestricted basis.
6. I invited the Respondent to respond to the appeal.

#### **The Respondent's submissions**

7. J Cunningham made comprehensive and eloquent submissions on behalf of the Respondent in support of the appeal inviting me to set aside the Tribunal's decision and to remit the matter to a new panel of the First-tier Tribunal for rehearing.
8. The Respondent's submissions were sent to the Appellant's representative on 16 October 2020 and he was invited to respond within one month. The Upper Tribunal received no response so the file has been returned to me.
9. Given that the Respondent now supports the appeal, and given that Mr Hall has made detailed submissions in support of the appeal both in writing and at the oral hearing of the permission application, I consider that it is not in the interests of justice to wait any longer for any response from the Appellant and I have decided to determine the appeal.

#### **My decision**

10. At the permission stage I had to be persuaded only that it was arguable with a realistic prospect of success that the Tribunal erred in law in a way which was

material. At this stage I need to be satisfied to the civil standard that the Tribunal did so err.

11. In relation to the mobility activities the Tribunal awarded 4 points under mobility activity 2(b). The Appellant required at least 8 points to qualify for the mobility component of Personal Independence Payment at the standard rate, and at least 12 to qualify for the enhanced rate.
12. The Tribunal explained its assessment of the evidence and its fact finding in relation to mobilising:

“The HCP reports that [the Appellant] told her that the distance from her home to the local shops is “less than 5 minutes” (page 317). We consider it unlikely that [the Appellant] would have said this if the distance was, in fact, less than 4 minutes. Because of this, we find on the balance of probabilities that someone without health problems would take between 4 and 5 minutes to walk from [the Appellant’s] home to her local shops. We consider that a healthy woman of about [the Appellant’s] age, could walk between 310 and 390 metres in 4 to 5 minutes. Because of this, we find on balance of probabilities that it is more than 300 metres from [the Appellant’s] home to the local shops. Based on the HCP’s report (page 317), we find that [the Appellant] walks that distance without stopping, but it takes her 10 minutes. We infer from page 317 that, after a short rest, she can walk for another 5 – 10 minutes.” (paragraph 18 of the Tribunal’s statement of reasons, at page 388 of the appeal bundle)
13. The Tribunal went on to consider the Appellant’s ability to mobilise to the standard required by the PIP Regulations (and, in particular, regulations 4(2A) and 7) in the light of the findings quoted above, taking into account evidence before it in relation to her asthma and other reported medical conditions. The Tribunal accepted that her walking would be slow over 300 metres but “... consider it unlikely that she could manage that walking unless, on over 50% of the days, she could move more than 50 metres, repeatedly, and taking no more than twice as long as the maximum period that a person without a relevant physical or mental condition would normally take to do this.”
14. The Tribunal went on to decide that the Appellant was, on the balance of probabilities, able to stand and then move more than 50 metres, safely, to an acceptable standard and repeatedly, and that she could do so within a reasonable time period, therefore scoring 4 points for mobility activity 2(b).
15. It is clear from this explanation that the Tribunal placed very considerable weight on the HCP’s report of what the Appellant told her about the distance from her home to the local shops when deciding the appropriate scoring of the Appellant’s ability to carry out the activities contemplated by mobility activity 2.
16. Mr Hall contends, on the basis of mapping data available from Google, that the Tribunal made a mistake as to the distance from the Appellant’s home to the bus stop which she uses to travel to the local shops, and that this finding amounts to an error of law which is material to the FtT decision. This brings us to the question of whether the Google data which Mr Hall seeks to rely on should be admitted.
17. The Tribunal Procedure (Upper Tribunal) Rules 2008 (the “**Upper Tribunal Rules**”) give the Upper Tribunal wide powers to decide what evidence to admit in proceedings before it. Rule 5(3)(d) of the Upper Tribunal Rules provides:

“5. –

...

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may –

...

(d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party”

18. Rule 15(2)(a) of the Upper Tribunal Rules further provides:

“15. -

...

(2) The Upper Tribunal may –

(a) admit evidence whether or not –

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker.”

19. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, at paragraph 7, Brooke LJ listed the errors of law commonly encountered in the immigration jurisdiction:

“i) Making perverse or irrational findings on a matter or matters that were material to the outcome (“material matters”);

ii) Failing to give reasons or any adequate reasons for findings on material matters;

iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;

iv) Giving weight to immaterial matters;

v) Making a material misdirection of law on any material matter;

vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;

vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.”

20. Brooke LJ’s item vii) was new to the social security jurisdiction, as Judge Knowles QC noted in paragraph 14 of *CDLA/3057/2014*:

“when that list was quoted by a Tribunal of Commissioners in paragraph 30 of *R(I) 2/06*, that principle was omitted for reasons which are not entirely clear. A Three Judge Panel/Tribunal of Commissioners did later include this principle in paragraph 8 of *R (DLA) 3/08* and since that date challenges on *E and R* grounds have been entertained in social security law [see, for example, paragraph 48 of *ZM v Her Majesty’s Revenue and Customs (TC)* [2013] UKUT 547 (AAC) and paragraphs 19-35 of *DC v Department for Social Development (ESA)* [2014] NI Com 49].”

21. The seventh error of law identified by Brooke LJ can be traced back to the Court of Appeal's decision in *E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49, which Brooke LJ explains was:

“concerned to provide a principled explanation of the reasons why a court whose jurisdiction is limited to the correction of errors of law is occasionally able to intervene, when fairness demands it, when a minister or an inferior body or tribunal has taken a decision on the basis of a foundation of fact which was demonstrably wrong.” (see paragraph 29 of *Iran*).
22. The Court's conclusion on the matter was set out by Carnwath LJ at paragraph 65 of *E and R*:

“In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.”
23. To show that a tribunal has made a mistake of fact, though, it will usually be necessary to present new evidence to the appellate authority. In *Ladd v Marshall* [1954] 1 WLR 1489 Denning LJ said at p. 1491:

“In order to justify the reception of fresh evidence [...], three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”
24. In paragraph 91(iii) of *E and R* Carnwath LJ held that:

“The admission of new evidence on such an appeal is subject to *Ladd v Marshall* principles, which may be departed from in exceptional circumstances where the interests of justice require.”
25. It follows from this that before assessing the fairness of a tribunal's decision in accordance with the four tests in *E and R*, any new evidence that is relied upon must, except in exceptional circumstances where the interests of justice require, first satisfy the three *Ladd v Marshall* tests.
26. *Hussain v Secretary of State for Work and Pensions* [2016] EWCA Civ 1428 concerned an appeal from a First-tier Tribunal which had upheld the Secretary of State's decision that the claimant was fit for work for the purposes of entitlement to Employment and Support Allowance. Before the Upper Tribunal the claimant sought to overturn the First-tier Tribunal's decision on the strength of new evidence he had

obtained (a new medical report) after the decision had been made. On appeal to the Court of Appeal Bean LJ observed (at paragraph 26):

“It is common ground [...] that new medical evidence sought to be adduced for the first time in the Upper Tribunal must be in line with the principles set out in *Ladd v Marshall*, namely that the evidence (a) could not have been obtained with reasonable diligence in advance of the hearing at first instance and (b) would have had an important influence on the result of the case. (There is also principle (c), that the new evidence must be *prima facie* credible, but that is not in issue here.)”

27. Bean LJ went on to add (in paragraph 27):

“There are cases in which an over strict application of the first principle against a party who appeared without representation, as Mr Hussain did in the First-tier Tribunal, can be contrary to the overriding objective of dealing with cases justly. I prefer, therefore, rather than asking whether a consultant’s report could have been obtained with reasonable diligence before the hearing in the FTT, to concentrate on the question of whether it would have been potentially decisive in Mr Hussain’s favour or at least have had an important influence on the result of the appeal. In my view, it would not.”

28. Bean LJ’s approach to “reasonable diligence” can properly be understood as a recognition that the diligence that can reasonably be expected from an unrepresented litigant in appeal proceedings intended to be accessible to laypeople acting for themselves is very different from the standard that would be applied to lawyers involved in civil or criminal proceedings before the courts, and this approach is consistent with *E and R* since Carnwath LJ acknowledged that the *Ladd v Marshall* principles could be departed from “in exceptional circumstances where the interests of justice require.” (see paragraph 91(iii) of *E and R*)

29. Further, in *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 0214 (a decision of the Tax and Chancery Chamber of the Upper Tribunal), Judges Bishopp and Greenbank considered the application of the *Ladd v Marshall* in the context of the wide discretion given to the Upper Tribunal under rule 15(2)(a) of the Upper Tribunal Rules (set out in paragraph 17 above.

30. In *Bramley v HMRC* the judges held:

“22. Given the rather different context of the Upper Tribunal Rules, we accept the points raised by Mr Bedenham that we should not apply the criteria in *Ladd v Marshall* as strict rules in the exercise of our discretion as to whether to admit new evidence. The principle governing the exercise of our discretion under Rule 15(2) must be that we should deal with cases fairly and justly in accordance with the overriding objective. That requires us to take into account all of the circumstances of the case.

23. That having been said, the *Ladd v Marshall* criteria are not irrelevant. We agree with the Tribunal in *Reed Employment* that the *Ladd v Marshall* criteria are of “persuasive authority as to how to give effect to the overriding objective”: see *Reed Employment* [97]. The *Ladd v Marshall* criteria should therefore be borne in mind when exercising our discretion under Rule 15(2)(a): see *Reed Employment* [100].

31. While *Bramley v HMRC* is a decision of the Tax and Chancery Chamber of the Upper Tribunal the analysis of how the *Ladd v Marshall* principles relate to the Upper Tribunal Rules is no less applicable in the Administrative Appeals Chamber. Ultimately the Upper Tribunal has a broad discretion to admit evidence under rule 15 of the Upper Tribunal Rules. It is required to “seek to give effect to the overriding objective” when it exercises any power under the Upper Tribunal Rules or interprets any rule or practice direction (see Rule 2(3) of the Upper Tribunal Rules), so while the *Ladd v Marshall* principles should be taken into consideration when deciding whether to admit evidence, they need not be applied strictly, and the decision whether to admit it will be made on the basis of what the Upper Tribunal determines justice requires.
32. While it is likely that Mr Hall’s mapping data would have had an important influence on the outcome of the appeal had it been before the Tribunal when it made the FtT Decision, and while it is prima facie credible, it might be argued that the mapping data which Mr Hall now seeks to rely upon could have been obtained with reasonable diligence in advance of the hearing at first instance by a professional representative. However, when evaluating whether the evidence should be admitted it should be remembered that the social security system is designed, in the words of Lady Hale, to “ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less,” (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 (reported as *R(DLA) 5/06*), at paragraph [41]). For this very reason the Respondent supports this appeal, having no interest in sustaining a decision on a claimant’s entitlement that was based on incomplete evidence.
33. Having borne in mind the principles laid out in *Ladd v Marshall*, and having regard to the matters set out above, I am satisfied that the interests of justice demand that Mr Hall’s mapping evidence is admitted.
34. Taking the four tests in *E and R* in turn, then:
  - a. *a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter:*

I am satisfied that the Tribunal was mistaken about the distance between the Appellant’s home and the place to which she said she walks (the local bus stop) by a considerable margin;
  - b. *the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable:*

I am satisfied that the new evidence put forward by Mr Hall as to the distance between the Appellant’s home and the bus stop to which she walks is uncontentious (its accuracy is not disputed by the Respondent) and capable of objective verification;
  - c. *the appellant (or his advisers) must not have been responsible for the mistake:*

Neither the Appellant nor her then representative can be said to have been responsible for the Tribunal’s error. As Mr Hall points out, the representative made no reference to the journey in question in her written submissions and the record of proceedings contains no note of any oral submission on the matter, and the Appellant was not present at the hearing before the Tribunal. While the google mapping data could have been generated by the Appellant’s then representative had she been aware that the kind of search that Mr Hall



performed was possible, and had she the skill to do it, her omission in not obtaining it was not culpable.

d. *The mistake must have played a material (but not necessarily decisive) part in the Tribunal's reasoning:*

It is clear from the Tribunal's explanation of its decision-making in paragraph 35 of its statement of reasons that its finding that the distance of the journey she described to the HCP was around 300 metres was at the very least material to its finding that she could mobilise more than 50 metres repeatedly and within a reasonable timeframe:

"Although she is slow over 300 metres, we consider it unlikely that she could manage that walking unless, on over 50% of days, she could move more than 50 metres, repeatedly, and taking no more than twice as long as the maximum period that a person without a relevant physical or mental condition would normally take to do this."

That finding was determinative in establishing that the Appellant could score no more than 4 points for the second mobility activity, which meant that she did not have sufficient mobility points to qualify for the mobility component.

35. I am therefore satisfied that all four tests in *E and R* are satisfied, that the Tribunal's factual error amounts to a material error of law, and that this warrants the setting aside of the decision.
36. It is appropriate to remit this appeal to be reheard by a fresh panel of the First-tier Tribunal because it is necessary for further facts to be found.
37. Mr Hall has identified other possible errors of law made by the Tribunal. Because I have decided to remit the appeal for rehearing there is no need for me to go into those other possible errors of law, as the panel hearing the remitted appeal will undertake a complete reconsideration of the issues that are raised by the appeal, and will not be bound by the decision of the previous panel in any way.

**(signed on the original)**

**10 February 2021**

**Thomas Church  
Judge of the Upper Tribunal**