IN THE UPPER TRIBUNAL **Case No.** CPIP/2582/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: Since the decision of the First-tier Tribunal (which it made on 1 June 2017 at Milton Keynes under reference SC043/17/00053) involved the making of an error of law it is set aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Further, the case is remitted to a differently constituted panel of the First-tier Tribunal for rehearing under section 12(2)(b)(i) of the same Act.

DIRECTIONS:

A. The tribunal must undertake (by way of an oral hearing) 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 particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 9 September 2016 and decided on 1 November 2016.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the original 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.

REASONS FOR DECISION

1. The claimant, who suffers from a range of health difficulties, was receiving a disability living allowance consisting of the higher rate of the mobility component and the lowest rate of the care component when the Secretary of State invited her to apply for a personal independence payment (PIP). She did so on 9 September 2016. On 4 November 2016 the Secretary of State decided that she was entitled to the standard rate of the daily living component of PIP from 30 November 2016 to 23 October 2020 but that she was not entitled to either rate of the mobility component. Dissatisfied, she sought a mandatory reconsideration. That led to the Secretary of State deciding, on 19 December 2016, not to alter the earlier decision with respect to the outcome. However, the Secretary of State did add one further daily living point. That meant that she scored 11 daily living points instead of 10. But it made no difference to the outcome because she required 12 points in order to establish entitlement to the enhanced rate of the daily living component. She also achieved 4 points under the mobility component which was not enough to establish entitlement to even the standard rate of that component.

2. The claimant, remaining dissatisfied after the mandatory reconsideration, appealed to the First-tier Tribunal (the tribunal). In her written grounds of appeal, which are relatively but not overly lengthy, she devoted five paragraphs to matters relating to the daily living component and two paragraphs relating to the mobility component. The tribunal held an oral

hearing of her appeal which she attended accompanied by her partner. She was not represented. The Secretary of State was represented by a Presenting Officer. The claimant, according to the record of proceedings, appears to have given quite lengthy evidence to the tribunal. At an early point in the record of proceedings the Tribunal Judge has written:

> "Awarded the DL standard rate.
>
> Appealing mobility."

3. When it went on to provide its statement of reasons the tribunal wrote:

> " 10. At the hearing, the appellant explained that she was not appealing the daily living component but only the mobility component. As a result, the tribunal focused its questions on descriptor 12 only."

4. The tribunal dismissed the claimant's appeal. According to its decision notice and its statement of reasons it decided that she was entitled to 10 daily living points under daily living descriptors 1b, 2b, 4b, 5b and 6b and 4 points under mobility descriptor 12b. So, on the face of it, it appears to have taken away the 1 daily living point which had been awarded under daily living descriptor 3b (the one added at the mandatory reconsideration stage). However, since it did not say anything about why it was doing so in its statement of reasons, it seems to me that it did not actually intend to do so and that it had simply overlooked the slight and meaningless (from the point of view of the outcome of the appeal) alteration to the original decision as a result of the mandatory reconsideration process. In any event nothing at all turns on that for the purposes of this appeal to the Upper Tribunal.

5. The tribunal, in addition to the oral evidence, had a good deal of documentary evidence including medical evidence, to consider. It is clear that, in large measure, it relied upon the expertise of its panel members in assessing key aspects of the claimant's medical situation. But it also had a letter which had been written by the claimant's GP on 13 January 2017. That was, from the claimant's perspective, a supportive letter in the sense that the content, if accepted, would have been of some help to her in seeking to prove her case. But the tribunal did not attach significant weight to it and this is what it said as to why not:

> " 33. The tribunal noted the comments of the GP in the letter dated 13.1.2017 (pages 19-20) but that was based largely on what the appellant had stated to the GP herself and was understandably supportive whereas the tribunal had many letters over a long period of time from her specialists where it was able to consider the actual medical basis for any functional impairment and as a result the tribunal attached little weight to the GP's letter (pages 163-164). Furthermore, the GP referred to historical surgical procedures but not the outcome, he referred to the negative aspects of her function but not the positive treatments that have been provided to improve her function and mobility …"

6. The claimant sought permission to appeal to the Upper Tribunal. She said that the tribunal had not given adequate reasons for its decision, had not considered the pain she would suffer and all the difficulties she would experience in performing repeated activities; had not considered the most recent medical evidence (which might have been a reference to the GP letter I have just referred to); and had not based its conclusion "on actual or factual observations". She also provided some factual information regarding her treatment. I made an unlimited grant of permission and in doing so said this:

> "The Tribunal may have fallen into error either in limiting itself to a consideration of possible entitlement to the mobility component only or in failing to adequately explain why it was doing so.

> That is because, notwithstanding what the claimant is recorded as having said to the tribunal at the hearing (see page 174 of the appeal bundle) she had indicated in her written grounds of appeal (see pages 8 and 9) some dissatisfaction with the decision to award her only the standard rate of the daily living component. Certain of what she said might have been construed as an argument that she ought to have been awarded more points under the activities in respect of which points had been awarded and, of course, she only needed a further 2 points in order to establish entitlement to the enhanced rate. An informed concession made by a competent representative is one thing but a concession made by a non-represented claimant might be another. Further, the brief recording of the concession in the record of proceedings does not demonstrate that the significance of it was explained to her."

7. I directed submissions from the parties.

8. Ms W Barnes, now acting on behalf of the Secretary of State in connection with this appeal to the Upper Tribunal, has provided a written submission indicating that the appeal is supported but not on the basis in respect of which I had granted permission. She argues that, as I read her helpful submission, the tribunal first of all had to decide whether the matter of entitlement to anything more than the standard rate of the daily living component was an issue raised by the appeal (see section 12(8)(a) of the Social Security Act 1998). She says that the phrase "raised by the appeal" does not mean the same as "raised by the appellant". She says that the tribunal had taken the view that any argument based upon possible entitlement to the enhanced rate of the daily living component would have had no prospects of success. She takes this view because the tribunal had said towards the end of its statement of reasons that although it was not interfering with the award of the standard rate of the daily living component it had been unconvinced about it "because the appellant's evidence about her medical condition and functionality throughout the day showed her to have good ability". She cites in support of her contentions paragraph 28 of the judgment of the Court of Appeal in *Hooper v SSWP* [2007] EWCA Civ 495. Ms Barnes leaves the argument there but I take it that she is saying the tribunal decided the issue was not raised by the appeal not on the basis of any concession but upon its own appraisal of the material before it; that it was open to it to approach matters in that way; and that it had properly explained what it was doing.

9. Ms Barnes then goes on to address the reason why she argues the F-tT erred in law. She refers to the GP letter mentioned above and argues that the tribunal did not provide an adequate explanation as to why it was not attaching more weight than it did to the information contained in that letter. She also accepts, as I read it, that what was said in that letter might impact not only upon the situation with respect to the mobility component but also with respect to the daily living component. She refers me to the decision of Upper Tribunal Judge Jacobs in *HL v SSWP (DLA)* UKUT 183 (AAC). She urges me to set aside the tribunal's decision and to remit for a rehearing.

10. The claimant has produced a reply to that submission. She does not say, one way or the other, whether she agrees that the case should be remitted for a rehearing but she does say that she does not want an oral hearing in the Upper Tribunal. She then makes a number of factual claims regarding the difficulty she has with a number of daily living activities and refers to a number of items of medical evidence. She then makes some further assertions with respect to mobility. She has submitted with that reply some further documentary medical evidence but all of it appears to have come into existence after the tribunal heard the appeal so it is not relevant to the question of whether the tribunal erred in law.

11. I have decided not to hold a hearing of the appeal before the Upper Tribunal. Both parties have indicated that they do not want one and I see no reason to think that such a hearing will take matters any further.

12. I have decided that the tribunal did err in law on two different bases. I explain why below.

13. Myself and Ms Barnes seem to have been looking at the first issue in slightly different ways. My focus is upon the question of whether the tribunal was right to accept what appeared to be a concession made by the claimant that the award of the standard rate of the daily living component was the correct one without at least enquiring into the matter further. Ms Barnes, I think, feels it unnecessary to ask whether any concession was or might have been made because the question of what was or was not raised by the appeal did not depend upon what the claimant was or was not seeking to raise herself but upon what the tribunal thought was raised by the appeal on the basis of the evidential and other material in front of it. At paragraph 28 of *Hooper*, upon which she relies, this was said:

> "I would endorse the valuable guidance given in *Mongan.* The essential question is whether an issue is "clearly apparent from the evidence" (para15 in *Mongan*). Whether an issue is sufficiently apparent will depend on the particular circumstances of the case. This means that the tribunal must apply its knowledge of the law to the facts established by them, and they are not limited in their consideration of the facts by the arguments advanced by the appellant. I adopt the observations of this court in *R v Secretary of State for the Home Department ex p Robinson* [1998] 1 QB 929 at p 945 E-F in the context of appeals in asylum cases. But the tribunal is not required to investigate an issue that has not been the subject of argument by the appellant if, regardless of what facts are found, the issue would have no prospects of success.

14. The reference to *Mongan* is a reference to the judgment of the Northern Ireland Court of Appeal in *Mongan v Department of Social Development* [2005] NICA 16 reported as *R4/01 (IS)*. In *Mongan*, which was dealing with a similar provision to section 12(8)(a) of the Social Security Act 1998, it was decided that a matter could be one raised by the appeal where it had not specifically been raised by one or other of the parties. In *Hooper* a similar view was taken and at paragraph 27 it was said

> "But it is clear that the fact that an issue is not identified by the appellant in his appeal notice or even during the oral hearing does not mean that it is not "raised by the appeal".

15. It is evident from what was said in the above passages and in the surrounding paragraphs of the judgment that the focus in *Hooper* was upon what the position might be where a party had not raised a specific issue in the grounds of appeal or oral argument but that it was apparent from the material available and the surrounding circumstances that such issue was raised by the appeal. Where that was the case a tribunal had to deal with it. But it was not being said that where a party did raise an issue connected to the decision under appeal a tribunal was entitled to simply decide not to deal with it or not to treat it as a matter raised by the appeal. The closing words of paragraph 28 of *Hooper* mean no more than that a tribunal does not have to trouble itself with hopeless arguments which a party has not specifically placed in issue.

16. As Upper Tribunal Judge Wright recently pointed out in *ET v SSWP (PIP)* [2017] UKUT 478 (AAC) if an issue is raised by the appeal then the effect of section 12(8)(a) of the Social Security Act 1998 is that that issue must be considered by the First-tier Tribunal. If an issue is not raised by the appeal then the First-tier Tribunal, nevertheless, has a discretion as to whether it should or should not consider the issue (section 12(8)(b)) but that discretion must be exercised consciously and judicially and reasons must be given to explain the exercise of the discretion. Turning to the situation where there is a concession on a matter raised by the appeal then in my judgment a tribunal will, first of all, have to decide whether to accept that concession. If it does so, having satisfied itself in light of its inquisitorial function that it is right to do so then the particular matter, ordinarily at least, will at the point of acceptance cease to be a matter raised by the appeal. That will mean section 12(8)(a) will no longer operate to oblige the tribunal to deal with the issue. That does not mean it is no longer permitted to deal with the issue because even though it has ceased to be one raised by the appeal there remains the discretion stemming from section 12(8)(b). But the actual obligation will fall away.

17. Applying all of that to the situation in this appeal, the claimant had raised the matter of entitlement to the enhanced rate of the daily living component through what she had said in her written grounds. But she told the tribunal that she was not pursuing such an argument before it. The tribunal acted upon that concession and did not consider whether there was entitlement to the enhanced rate or not. It is not clear from what it said whether it was taking the view (as it should have done if satisfied it was right to accept it) that the concession meant the question was no longer raised by the appeal or whether it thought it was still raised by the appeal but that it was not appropriate to exercise discretion to consider it. But the point is that it did consider it appropriate to accept the concession.

18. In my judgment where a concession is offered by a competent representative, a tribunal will ordinarily be entitled to accept it if it wishes, without probing further. But that does not necessarily follow in the case of an unrepresented claimant. That was especially so in this case given that that unrepresented claimant had raised issues relevant to daily living when making her written appeal. I do not say that a tribunal, faced with such a situation cannot or should not accept a concession from an unrepresented claimant. But I do say that in such circumstances it should satisfy itself that the claimant has properly understood matters and is making an informed decision not to pursue a particular issue. In my judgment what is recorded in the record of proceedings and what is written in the statement of reasons does not quite demonstrate that the tribunal did that in this case. I might have reached a different view had matters concerning daily living not been raised in the written grounds of appeal but they were. So, the tribunal erred in failing to probe matters sufficiently before deciding it was appropriate to accept the concession. I conclude that, on that perhaps relatively narrow basis, it did err in law.

19. There is then the matter of the GP letter. I am grateful to Ms Barnes for highlighting this. I have decided that she is right to argue that the tribunal did err in failing to properly evaluate the letter and properly explain why it was not attaching weight to it.

20. It will be recalled that one of the reasons the tribunal gave for not attaching weight to the letter was its view that the content was largely based upon what the claimant had stated to the GP. However, in fact the bulk of the content of the letter addresses the nature of the medical conditions from which the claimant suffers, the medical intervention that there has

been and the lack of success with respect to those interventions. That is clearly information within the GP's knowledge not something which the claimant has told him. So, much of what is said in the letter cannot be discounted in that way. The tribunal also expressed the view that the GP's letter was "understandably supportive". That seems to amount to a suggestion that the GP was trying to say something helpful to the claimant and hints to an extent at least, on one reading, at a possible lack of objectivity. But the letter does not read like that. It reads like an objective appraisal of her problems written by a medical professional who knows the claimant and who is trying to place on record his view as to the medical difficulties that she has. I appreciate that the tribunal did have other medical evidence before it, a point which it made. I appreciate that it was not obliged to accept the content of the GP letter. But in my judgment it was not entitled to effectively dismiss the letter for the particular reasons which it gave. So that too represents an error of law on the part of the tribunal.

21. In light of the above I have concluded that the tribunal's decision has to be set aside. My having reached that view on the basis of the two errors set out above, it is not necessary for me to consider whether it might have made any more errors. That is because any other errors which it may have made will be subsumed by the rehearing which will now have to follow.

22. There will have to be a rehearing because I have decided to remit to a differently constituted tribunal rather than remake the decision myself. As to that, I have not been specifically invited to remake the decision by either party. There are, in my view, further facts to be found before this appeal can be properly determined and that task is best undertaken by the First-tier Tribunal which is, after all, an expert fact finding body. Further, it will have available to it, through the composition of its panel, a range of expertise which will not be available to me.

23. The tribunal rehearing the appeal will not be limited to the grounds on which I have set aside the decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing.

24. The 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 **18 January 2018**