

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

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

**UNIVERSAL CREDIT**

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 20 September 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is an application by a claimant for leave to appeal from the decision of a tribunal with reference BE/4833/21/05/O.
2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. I consider that this is an appropriate case in which to exercise the discretion afforded me by Article 15(7) of the Social Security (NI) Order 1998 to set aside the decision of the tribunal without making a formal finding of error of law.
4. I refer the appeal to a newly constituted tribunal for determination in light of the directions given in the final paragraph below.

**REASONS**

5. I acknowledge that these proceedings have been delayed for an unusually long period of time, particularly in the light of the consensus between the parties. I apologise to the appellant for the delay.

**Background**

6. The appellant had made a joint claim for universal credit (UC) along with her husband to the Department for Communities (the Department) on 24 September 2018. On 23 October 2018, a decision was made to award

UC, but this award did not include any transitional top-up payments. Legislation providing for top up payments subsequently came into effect on 24 July 2019. As a result of the new regulations, the appellant was awarded transitional top-up payments and arrears from the beginning of the claim. She requested a reconsideration of the decision, submitting that she was still worse off financially as a result of moving to UC and asking to be moved back to legacy benefits. On 12 December 2020, the decision was reconsidered by the Department but not revised. The respondent appealed. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting with a medical member on 20 September 2022. The tribunal disallowed the appeal.

7. The appellant requested a statement of reasons for the tribunal's decision, and this was issued on 21 December 2022. The appellant applied to the LQM of the tribunal for leave to appeal to the Social Security Commissioner, but the LQM refused the application by a determination issued on 3 March 2023. On 24 March 2023, the appellant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

8. The appellant, represented by Ms Rothwell-Hemsted of Law Centre NI, submits that the tribunal has erred in law on the basis that:
  - (i) the record of proceedings was inadequate;
  - (ii) the proceedings were unfair as an adjournment refusal had been pre-determined;
  - (iii) the proceedings were unfair as a British sign language interpreter was not competent;
  - (iv) the proceedings were unfair as the LQM mischaracterised the appellant's case;
  - (v) it misapplied the law;
  - (vi) it gave inadequate reasons;
  - (vii) it reached conclusions unsupported by evidence.
9. The Department was invited to make observations on the appellant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had erred in law as alleged in ground (vi) and indicated that the Department supported the application.

## **The tribunal's decision**

10. The LQM has prepared a statement of reasons of the tribunal's decision. From this I can see that the tribunal had documentary evidence and submissions before it, consisting of the Departmental submission and submissions from the appellant's representative, Law Centre NI. The appellant's representative had indicated that it would be seeking a direction for further evidence to be provided, indicated that the appellant was profoundly deaf and required a British Sign Language (BSL) interpreter. A subsequent e-mail asked whether it was necessary for the appellant to attend the hearing in the light of the submission regarding the need for further evidence. The appellant did not attend but was represented by Ms Rothwell. A sign language interpreter was in attendance.
11. At the outset of the hearing, it is noted that "the tribunal summarised to the interpreter the appellant's statement about her for comment". This appears to be a reference to an e-mail dated 16 September 2022 which is not in the papers before me, but in which it appears that the appellant had questioned the competence of the interpreter assigned to her case and indicated that she would not be attending. At the LQM's request, the interpreter stated her experience and qualifications. The representative outlined her case that the appellant was incorrectly moved to UC for reasons relating to her disability and that she wished to have the Department's relevant policies placed before the tribunal, with the implication that an adjournment was necessary.
12. The tribunal proceeded to determine the appeal. It addressed the case law submitted on behalf of the appellant. It found no evidence that she had been forced to claim UC and found that she had not complained about the position until two years later. It found that she had received transitional protection and had not been discriminated against. It disallowed the appeal.

## **Relevant legislation**

13. UC was introduced in Northern Ireland by Article 6 of the Welfare Reform (NI) Order 2015 (the 2015 Order) as a replacement for a range of "legacy benefits". Article 39 of the 2015 Order abolished four of the legacy benefits – namely, income-based job seeker's allowance (IBJSA), income-related employment and support allowance (IRESA), income support (IS) and housing benefit (HB). Two remaining legacy benefits - WTC and CTC - were abolished by section 33(1)(f) of the Welfare Reform Act 2012.
14. Article 42 and Schedule 6 of the 2015 Order allowed the making of administrative provisions to manage the transition from former legacy benefits to UC. The Universal Credit (Transitional Provisions) Regulations (NI) 2016 (the Transitional Provisions Regulations) were made under those powers. They provided for a system of managed migration to UC, whereby claimants would be notified of a specific date on which their legacy benefit

entitlement would end and be invited to claim UC. They also provided for additional benefit in the form of a transitional element for affected claimants. At the same time, outside this system, a process of “natural migration” operated where a UC claim was made voluntarily or as the result of a change of circumstances that triggered an end to legacy benefit entitlement without any transitional protection.

15. The Transitional Provisions Regulations were subsequently amended by way of the Universal Credit (Managed Migration and Miscellaneous Amendments) Regulations (NI) 2019 (the MMMA Regulations). From 24 July 2019, regulation 64 and Schedule 2 were inserted to make provision for certain claimants previously entitled to SDP.
16. A principal basis of entitlement to transitional protection for those formerly entitled to SDP is set out in Schedule 2, paragraph 1, as follows:

“1. Where it comes to the attention of the Department that—

- (a) an award of universal credit has been made in respect of a claimant who, within the period of one month immediately preceding the first day on which the claimant became entitled to universal credit as a consequence of making a claim, was entitled to an award of income support, income-based jobseeker’s allowance or income-related employment and support allowance that included a severe disability premium; ...”.

Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a “Convention right” as defined in s.1(1). The Department for Communities is a public authority and that the making of secondary legislation by it falls within the ambit of s. 6(1).

Article 14 of the ECHR provides:-

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 1 of the First Protocol to the ECHR (“A1P1”) provides:-

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject

to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

### **Submissions**

17. Ms Rothwell-Hemsted of Law Centre NI made the following submissions on behalf of the appellant:

“Ground 1: Record of Proceedings (ROP) is materially inadequate

I was the Appellant’s representative at the tribunal hearing on 20/09/2022. I have enclosed a copy of my own contemporaneous note of the hearing for the benefit of the Commissioner. This is significantly longer and more detailed than the ROP provided by the LQM.

The ROP totals less than 8 lines and omits relevant and materially important information.

I wish to draw attention to the following material omissions from the ROP in particular:

- a. The ROP fails to record that the LQM refused to allow the appeal to proceed without the BSL interpreter, despite the fact that the appellant was not present and despite my requests for this not to be the case both before and during the hearing.
- b. The ROP fails to record the fact that the interpreter herself was content to leave the hearing and outlined to the LQM that her role was to interpret what was being said on behalf of a deaf client and she was not there to express her views. The interpreter was actively encouraged by the LQM to comment, despite the client not being present and the interpreter not being a party to the proceedings.
- c. The ROP fails to record that the interpreter made several references to the fact that concerns had been raised about her in the past by members of the deaf community, and that on two occasions she referred to there being rumours about her in the deaf community that she was not sufficiently skilled

for legal work. This reflects the nature of the client's concerns, but the LQM failed to record or address whether this added relevant context to the appellant's concerns, or her perceived ability to have a fair hearing.

- d. The ROP fails to record my comments articulating unease about the appropriateness of requiring a deaf appellant to outline her concerns about an interpreter through that same interpreter.
- e. The ROP fails to record the proceedings in relation to the substantive grounds of appeal which were discussed after the BSL interpreter did leave the hearing, including discussion and submissions that I made in relation to the case law submitted, the history of our requests for further evidence from the Department, the fact that requests as far back as 2018 remained outstanding, that the Department had entered into negotiations with Law Centre NI on potential settlement of this case, and why it was felt that the evidence requested was reasonably necessary for adequate findings of fact to be made by the tribunal.

Ground 2: Procedural unfairness in proceeding with the hearing with a third party present, making pre-determined decisions, and inviting comment from someone who was not a party to the proceedings

I submit that the tribunal was in error of law on grounds of procedural fairness. There is evidence that the LQM's decision to refuse the adjournment request had been predetermined. Before the hearing commenced, the clerk informed me that the LQM had already indicated that the appeal would be going ahead, the interpreter would not be cancelled, and that the hearing would not proceed without her. It appears that the LQM had decided in advance that he would determine the appeal in the absence of the client and that he had made a pre-determined decision on the adjournment request and reasonableness of the client's concerns. It was also apparent that his pre-determined views on these issues had been communicated to the clerk.

When the BSL interpreter arrived, both myself and the interpreter were invited into the hearing, despite the appellant not being present and my requests for this not to be the case.

Both before and during the hearing, I asked if the appeal could proceed without the BSL interpreter, because the appellant was not present. There was no requirement for a BSL interpreter to be present as there was no client in need of her services. The interpreter was not a party to proceedings.

Although the ROP fails to record the nature of the comments and questions from the LQM, it is clear that the tribunal asked the interpreter for her comments. This was both inappropriate and irrelevant to the issues in the appeal.

I submit that comments made by the LQM and the BSL interpreter during the hearing, including the suggestion that the appellant was making a “personal attack” and that she was not entitled to “pick and choose” an interpreter failed to acknowledge the legitimate concern that the appellant should receive a fair hearing in which she was confident that she could be understood, and created an atmosphere in which it would be difficult for her to receive a fair hearing due to the perception of bias.

Ground 3: The tribunal failed to address the impact of concerns about interpreter competence and the right to a fair hearing

The tribunal failed to consider the impact of the interpreter issues on the appellant’s right to a fair hearing, including the perception and fear on her part that she could not receive a fair hearing with a less experienced interpreter with whom she had experienced issues in the past.

My email dated 16/09/2022 outlined that the appellant “has indicated to me that this interpreter is known to not understand deaf people fully and that she would not have the skills for legal work. She would not feel comfortable proceeding with the tribunal with this interpreter”. While it was confirmed that the BSL interpreter was fully qualified at the date of hearing, the appellant has since advised me that the same BSL interpreter had interpreted for her daughter (who is also deaf) in the past when she was not fully qualified, and that the appellant had experience of this interpreter herself during a hospital appointment, and found that she was unable to understand her.

The case of CDLA/2748/2002 held that it was not adequate to establish a fair hearing for a tribunal chair to conclude that there was sufficient understanding when they were aware of potential issues (in that case, primarily issues of

dialect). The Commissioner in that case held that the tribunal chair has the task of dealing with concerns raised, investigating them, and making appropriate decisions. While the LQM in the present case did ask the interpreter about her qualifications, I submit it was not appropriate or possible to investigate whether there was sufficient understanding in the absence of the appellant. The LQM failed to address comments made by the interpreter about concerns having been raised by the deaf community before, and there being rumours about her not being skilled enough.

Whether these concerns were well-founded or not, I submit that the appellant did have a genuine concern that she would not be understood or able to communicate accurately at her own appeal and the tribunal failed to address the impact of this upon her right to a fair hearing.

Ground 4: The tribunal proceedings and refusal to properly consider the adjournment request was in breach of natural justice

The adjournment was sought on two main grounds. Firstly, that the appellant was apprehensive about the interpreter's ability to understand her and accurately communicate with the tribunal on her behalf. Our concerns about the tribunal's failure to consider this in the context of perceived bias and the right to a fair hearing are outlined above.

The second ground for adjournment was that the appellant's representatives had made requests for further evidence from the Department which was considered relevant to findings of fact as to whether the appellant was misadvised to claim UC. While the LQM used language of coercion and duress, this is not the terminology which Law Centre NI had used in its correspondence or oral submissions. In the Statement of Reasons (SOR), the LQM appears to accept that one of the grounds of appeal was alleged misadvice, though concludes, for example at paragraph 25, that she "has not demonstrated the claim was made under duress". The tribunal proceeded to make findings of fact in the absence of evidence that had been reasonably requested by the appellant. There was evidence before the tribunal that the appellant and her representatives had attempted to access information which had not been released by the Department. This created an inequality of arms issue that the tribunal failed to address.



As noted by Baroness Hale in *Kerr v Department for Social Development (NI)* [2004] UKHL 23 at paragraph 62:

*What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.*

In the interests of justice, it is submitted that the tribunal should have considered the evidence held by the Department before proceeding with the case.

The Commissioner confirmed in *DJS v DFC (PIP)* [2021] NI Com 22 that while the tribunal has the power to proceed in the absence of an appellant, the LQM is under an obligation to have regard to all the circumstances, including any explanation offered for the absence. The Commissioner decided that the following principles are relevant when reviewing the exercise of a tribunal 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.*

I submit that in the present appeal, the LQM made a mistake in law (see below), disregarded the appellant's right to a fair hearing, disregarded relevant matters and refused a request for the Department to be directed to produce materially relevant evidence. I submit that the

decision to proceed with the hearing in the circumstances was outside the bounds of reasonable decision making and gave rise to injustice, both due the appellant's reasons for not attending and the absence of materially relevant evidence which had been requested from the Department.

Ground 5: The tribunal misapplied and misunderstood the law

I submit that the tribunal materially misunderstood the law. At paragraph 18 the SOR states that the appellant could amend or withdraw her claim for UC at any time before a decision is made. This is factually and legally incorrect. It is well-established that it is the act of making a claim for UC that ends entitlement to legacy benefits, and that withdrawing a claim before a decision on entitlement is made cannot reverse this. Once the appellant had made the claim to UC, there was no legislative mechanism for her to reverse the impact of that on her entitlement to legacy benefits. This is why the appellant sought findings of fact as to whether she was misadvised and incorrectly moved to UC.

I submit that the tribunal failed to fully consider the case law which was submitted and analyse its potential application to the facts of the present case. The tribunal declined to establish the findings of fact that were necessary to decide this case. At the hearing, the LQM indicated to me that he would read the case law submitted in more detail after the hearing but that he disagreed with my understanding of these cases. The decision notice was issued on the same date as the hearing without any further detail about the application of the case law. In the SOR, the LQM distinguishes the case of *TP and AR No. 3* [2022] EWHC 123 (Admin) on the basis that transitional payments were made to the appellant. While some transitional protection payments of £120 per assessment period were received, this does not represent compensation for the full loss of income, and this is the basis on which I was relying upon the case of *TP and AR No.3*. The LQM does not appear to have engaged with this argument.

Ground 6: The tribunal gave inadequate reasons for its decision

The SOR outlines the tribunal's view, at paragraph 11, that natural migration occurs when a "transfers to Universal Credit at their own initiative" and that managed migration occurs when the Department "instigated matters" by inviting or telling a claimant to claim UC.

The tribunal failed to consider materially relevant evidence that was potentially held by the Department which would indicate whether this was an informed choice of the appellant's own initiative or not, and instead relied upon assumptions about the UC system generally and applied these assumptions to the unestablished facts of the case.

The tribunal also failed to give adequate reasons as to why it rejected the discrimination-based grounds of appeal.

Ground 7: The tribunal reached conclusions not supported by evidence

In concluding that the appellant was not misadvised, the tribunal reached conclusions that were unsupported by evidence. As explained above, this conclusion appears to have been made on the basis of general assumptions about the UC process and a view that the appellant was not misadvised.

The LQM was aware that the appellant's representatives believed potentially relevant information was held by the Department. The appellant was also willing to give evidence herself if another interpreter, with whom she did not have a previous negative experience, had been booked for the hearing. While the LQM concludes in paragraph 25 that "the appellant has not demonstrated the claim was made under duress", the LQM refused to hear or obtain evidence which was believed to be materially relevant to whether she was misadvised.

At paragraph 23 the LQM states that "it seems to me improbable that the appellant would be unaware of what she was doing on the computer terminal" or that the other requested evidence would advance matters. The LQM has deemed this evidence as unhelpful without viewing or considering it at all. These comments also demonstrate a lack of understanding of how deaf claimants whose first language is BSL struggle with written English and communication via email and online systems. I attach a copy of Nuffield Foundation report, 'Reading and Dyslexia in Deaf Children' (Herman, Roy and Kyle, 2017) which highlights the scale of reading difficulties in the deaf community.

The appellant was denied the opportunity to explain her difficulties and lack of understanding of what she was doing when she made her claim for UC at the Jobs and Benefits

Office by the unreasonable refusal of the adjournment request in this case.”

18. Mr Clements of Decision Making Services made observations in response. He submitted:

“Ground 1: Adequacy of the record of proceedings

Ms Rothwell-Hemsted highlights the brevity of the tribunal’s record of proceedings and submits that it omits relevant and materially important information. She has provided a copy of her own notes from the day of the hearing (which she attended as the appellant’s representative) and has highlighted various omissions from the record of proceedings.

Regulation 55(1) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 sets out the requirement for the record of proceedings to be sufficient to indicate the evidence taken:

*“55.—(1) A record of the proceedings at an oral hearing, which is sufficient to indicate the evidence taken, shall be made by the chairman or, in the case of an appeal tribunal which has only one member, by that member, in such medium as he may determine.”*

Chief Commissioner Martin confirmed at paragraph [16] of the decision *C48/99-00(DLA)* that there is no obligation for the record of proceedings to be a verbatim record of all that was said and all that occurred at the hearing of the appeal, although it should summarise all relevant evidence and note any written evidence or submissions received by the tribunal during a hearing.

*“16. In relation to ground (i) it is obvious that the Chairman’s record of proceedings is not a complete record of all that went on at the hearing. However, there is no obligation to make a verbatim record of all that does occur at a Tribunal hearing although the record should summarize all relevant evidence and also note any written evidence and submissions that are received by the Tribunal during the hearing. It is difficult for a Commissioner, who has only jurisdiction to decide appeals on points of law, to rule on whether something occurred or did not occur at a Tribunal hearing. In light of my findings*

*on ground (iv) I do not consider it necessary or constructive to pursue this issue any further save to emphasize that a Tribunal has an obligation to summarize all relevant evidence and also to note that any particular written evidence or submissions were received by the Tribunal during the hearing.”*

A Tribunal of Commissioners in Great Britain noted in *R(DLA) 3/08* that procedural or other irregularities must be capable of making a material difference to the outcome or the fairness of the proceedings in order to render a tribunal’s decision erroneous in point of law. The Tribunal held at paragraph [27] that an appellant must show that a failure to comply with regulation 55 was material to the decision in the sense that it has resulted in a real possibility of unfairness or injustice (in a case where there was no record of proceedings at all).

From the notes provided by Ms Rothwell-Hemsted, it seems to be the case that the legally qualified panel member (LQM) asked Ms Rothwell-Hemsted to put issues she raised in an email to the Appeals Service dated 16 September 2022 (which I cannot find in the case papers provided) to the interpreter. It appears that the email outlined the appellant’s concerns about the interpreter’s competence. After the interpreter responded, the LQM asked Ms Rothwell-Hemsted if there was any need for the interpreter to be present for the remainder of the hearing. She replied that there was not, and the interpreter then left. The interpreter did not make comments on any aspect of the appellant’s appeal other than to address the objections made about her suitability to act as an interpreter for the appellant, and she was not present when the substantive issues raised by the appeal were discussed.

Omission a. concerns a failure to record that the LQM refused to allow the appeal to continue without the interpreter. Given that, per Ms Rothwell-Hemsted’s notes, the interpreter was only present at the beginning of the hearing to address the objections made about her competence as an interpreter and thereafter the LQM did, in fact, allow the appeal to continue without her, and bearing in mind that there is no duty for the record of proceedings to be a verbatim record of all that was said and all that occurred at the hearing, I submit that the tribunal has not erred in this respect.

I submit that the tribunal should have recorded that the interpreter left the hearing before the substantive grounds

of appeal were discussed. Nonetheless, I do not believe that omission made a material difference to the outcome or to the fairness of the proceedings and consequently I submit that it does not render the tribunal's decision erroneous in point of law.

Omissions b. and c. concern comments made by the interpreter that were omitted from the record of proceedings, namely that she was content to leave the hearing, that she was only there to interpret and was not there to express her views, and her references to concerns that had been raised by other members of the deaf community. I note again that the interpreter only expressed her views on the comments made about her competence by Ms Rothwell-Hemsted on behalf of the appellant and that she left the hearing before the substantive grounds of the appeal were discussed. Her response to the objections raised by the appellant appears to be adequately summarised in the record of proceedings. Her reference to apparent concerns raised by other members of the deaf community may not add much to Ms Rothwell-Hemsted's email of 16 September 2022 (which apparently states that the interpreter is "known" not to understand deaf people) and so arguably did not need to be specifically referred to again in the record of proceedings. I submit that the tribunal has not erred in law in respect of omissions b. and c.

Omission d. relates to a failure to record that Ms Rothwell-Hemsted articulated unease about the appropriateness of requiring a deaf appellant to outline her concerns about an interpreter through that interpreter. With respect to Ms Rothwell-Hemsted it is not apparent to me from her notes that she made this point during the hearing. Therefore, I am not of the view that the tribunal erred in law in this respect.

Omission e. concerns the failure to record the proceedings in relation to the substantive grounds of appeal. The entirety of the record of proceedings in respect of the substantive grounds of appeal reads:

*"The appellant's representative: she was incorrectly moved to this benefit. We wanted the Department to outline their policies."*

On the basis of Ms Rothwell-Hemsted's notes from the hearing, this does not appear to be an adequate summary of the proceedings. As she has noted, the record of proceedings does not record her argument that it was

necessary for the tribunal to adjourn so that Department may provide further evidence concerning the appellant's claim to UC, nor does it record the reasons given by the LQM for his refusal to adjourn. At paragraph [6] of *R(DLA) 3/08*, the Tribunal of Commissioners said:

*“6. The words “which is sufficient to indicate the evidence taken” in paragraph (1) are not words of limitation, but rather provide for one specific essential requirement for an adequate record of proceedings. As Mr Brodie submitted, the natural meaning of a record of “the proceedings at an oral hearing” is a record of what happened and therefore it should include (eg) a record of any procedural application such as an application for an adjournment including the result of any application.”*

Upon reading Ms Rothwell-Hemsted's notes (and her letter of 13 September 2022) I am not certain that she directly requested either an adjournment or a postponement on this ground, but it is nonetheless plain that her position at the hearing was that the tribunal could not make the requisite findings of fact without adjourning the appeal.

I agree with Ms Rothwell-Hemsted that the tribunal has erred by omitting the record of her argument from the record of proceedings. However, the tribunal has addressed her argument at paragraph 23 of its statement of reasons and it has explained in the statement of reasons why it did not adjourn to obtain further evidence from the Department. It also seems from her notes that she did not add anything new to the argument she made in her letter of 13 September 2022 at the hearing. Therefore, I submit that the error did not make a material difference to the outcome or the fairness of the proceedings and, accordingly, it is not an error of law.

## **Ground 2: Procedural irregularities**

Ms Rothwell-Hemsted refers to a conversation prior to the hearing in which the clerk to the tribunal indicated that the hearing would be going ahead and argues that the LQM committed procedural irregularities in deciding in advance that he would determine the appeal in the absence of the claimant and in making a pre-determined decision on the adjournment request and the reasonableness of The appellant's concerns. She submits that the tribunal's actions in proceeding with the hearing in the presence of a

third party who was not a party to the proceedings, and inviting comment from that party, are also procedural irregularities.

Regulation 51 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 reads:

*51.—(1) Where a person to whom notice of an oral hearing is given wishes to request a postponement of that hearing, he shall do so in writing to the clerk to the appeal tribunal stating his reasons for the request, and the clerk to the appeal tribunal may grant or refuse the request as he thinks fit or may pass the request to a legally qualified panel member who may grant or refuse the request as he thinks fit.*

*(2) Where the clerk to the appeal tribunal or, as the case may be, the legally qualified panel member refuses a request to postpone the hearing he shall—*

*(a) notify in writing the person making the request of the refusal; and*

*(b) place before the appeal tribunal at the hearing both the request for the postponement and notification of its refusal.*

*(3) The legally qualified panel member or the clerk to the appeal tribunal may of his own motion at any time before the beginning of the hearing postpone the hearing.*

*(4) An oral hearing may be adjourned by the appeal tribunal at any time on the application of any party to the proceedings or of its own motion.*

As previously noted, I cannot find Ms Rothwell-Hemsted's email of 16 September 2022 in the case papers provided, although she has cited an excerpt from the email at paragraph 11 of the grounds for leave to appeal which includes the sentence "*[The appellant] would not feel comfortable proceeding with the tribunal with this interpreter*". Without the benefit of seeing the rest of the email, it seems to me that this may have been viewed by the Appeals Service as a request for a change of interpreter rather than a request for a postponement. In saying that, if it was not feasible for the Appeals Service to arrange for a different interpreter on such short notice (the email was sent two working days before the hearing), then a decision that a different interpreter was required would inevitably have led to a postponement. I note that the



tribunal does not state that a request for a postponement was made when addressing the email of 16 September 2022 in paragraphs 9 and 10 of its statement of reasons. I also observe that in Ms Rothwell-Hemsted's letter of 13 September 2022, in which she suggested that the tribunal could not make sufficient findings of fact without requesting further evidence from the Department, she did not, at least directly, request a postponement on that ground.

Requests for a postponement are normally decided by the LQM or the clerk before a hearing takes place. I would point out that the wording of regulation 51(2)(b) and regulation 51(3) make it clear that a refusal of a postponement request is expected to occur before a hearing. I submit that, if a postponement request was indeed made on 16 September 2022, a refusal of the request being made prior to the hearing is not a procedural irregularity.

I do not see any evidence in the case papers that written notice of a refusal of a postponement request was issued to Ms Rothwell-Hemsted in accordance with regulation 51(2)(a). Under the assumption that a postponement request was made on 16 September 2022, the request was sent just two working days prior to the hearing, and it seems plausible that the LQM did not consider the request until the day of the hearing. The clerk then gave Ms Rothwell-Hemsted what would have amounted to oral notice of the refusal prior to the hearing. Under those circumstances, while written notice should have been issued to Ms Rothwell-Hemsted if she did indeed make a request for a postponement, I am not of the view that the procedural irregularity made a material difference to the outcome or to the fairness of proceedings.

If no postponement request was made and the email of 16 September 2022 was instead simply a request for a change of interpreter, then it seems to me that the LQM had only refused the request to the extent that the originally scheduled interpreter would be present at the start of the hearing. There would have been little point in the LQM inviting comments from the interpreter on the appellant's objections if he had already made up his mind before the hearing began that the appeal would proceed regardless of any evidence provided by the interpreter. The tribunal states at paragraph 10 of its statement of reasons that "*At the hearing I explored with the interpreter her experience and qualifications. I was quite satisfied that she could provide the service for which she was engaged.*" I see no good reason to believe that if the interpreter's evidence

had failed to satisfy the LQM then he would not have considered adjourning the appeal so that a different interpreter could be arranged. With respect to the clerk's comments prior to the hearing, she seems to have merely explained the Appeals Service's general policy on interpreters to Ms Rothwell-Hemsted.

In respect of the ground raised by Ms Rothwell-Hemsted concerning the interpreter's involvement in the hearing being a procedural irregularity, I again note that the tribunal did not hear evidence from the interpreter in respect of the substantive grounds of appeal, or indeed evidence on any aspect of The appellant's appeal other than addressing the objections raised by Ms Rothwell-Hemsted on behalf of The appellant about the interpreter's competence. The interpreter left the hearing after responding to the objections made about her and was not present when the substantive issues were discussed.

It is apparent that Ms Rothwell-Hemsted sought an adjournment and the interpreter's evidence assisted the tribunal in deciding not to adjourn. I therefore submit that the tribunal has not committed a procedural irregularity in hearing the interpreter's evidence about her competence to act as an interpreter.

Ms Rothwell-Hemsted has also referenced a perception of bias against the appellant caused by the interpreter referring to the complaints made about her as a "personal attack" and the LQM's comment that "you cannot pick and choose" interpreters. Presumably, this only concerns the request for an adjournment and not a request for a postponement, if there was one, as the comments were made during the hearing. My reading of the LQM's comment is that appellants, in general, cannot pick and choose the interpreter that has been arranged to act for them at the hearing. The comment does not suggest that the appellant was being treated differently to any other appellant, and I do not consider that the LQM expressing this view created any reasonable perception of bias. I also do not see any reasonable basis to conclude from the interpreter's remark that she would not have interpreted on behalf of the appellant to the best of her ability had the appellant been present, nor any indication that the LQM would not have arranged for another interpreter if he considered that there was an appearance of bias.

### **Ground 3: Failure to address concerns about the interpreter's competence**

Ms Rothwell-Hemsted submits that, when deciding not to arrange for a different interpreter, the tribunal failed to consider the impact on the appellant's right to a fair hearing. She states that it did not consider the appellant's perception that she could not receive a fair hearing with a "less experienced" interpreter with whom she had experienced issues within the past. She cites a decision of a Commissioner in Great Britain, *CDLA/2748/2002*, and argues that the tribunal was unable to establish whether there was "sufficient understanding" in the absence of the appellant. Ms Rothwell-Hemsted also points out that the tribunal failed to address comments made by the interpreter about concerns raised by the deaf community about her skill level. She submits that the appellant had a genuine concern that she would not be able to communicate effectively at her appeal and the tribunal failed to address the impact of this upon her right to a fair hearing.

It does not seem that the tribunal was made aware of the appellant experiencing issues with the interpreter in the past. Ms Rothwell-Hemsted states that the appellant informed her of this "since" her email of 16 September 2022, and her notes from the day of the hearing do not indicate that the matter was raised at the hearing. Her notes reflect that the LQM asked the interpreter if she knew the appellant and the interpreter replied that she'd met her a number of years ago but couldn't believe that the appellant would make such a complaint about her. The tribunal's statement of reasons also says that the appellant had "*provided no basis for her criticism of the interpreter*", which further indicates that the tribunal were unaware of the appellant having issues with the interpreter in the past.

The tribunal made the following comments at paragraphs 9 and 10 of its statement of reasons:

*"9. On 16 September the appellant's representative contacted the appeal service stating the appellant had knowledge of the sign language interpreter the appeal service had engaged. She questioned her competence and it was indicated she would not be attending the appeal.*

*10. The appellant has chosen not to attend her appeal. It is unfortunate that she and her*

*representative presumed that the appeal would adjourn. It was my view that on the issues arising the appeal could proceed. It was not for the appellant to dictate what interpreter the appeal service engaged and she had provided no basis for her criticism of the interpreter. At the hearing I explored with the interpreter her experience and qualifications. I was quite satisfied that she could provide the service for which she was engaged. In deciding not to adjourn I have had regard to the guidance given in case law including TF -v- N.I. Public Services Ombudsman ([2022] NICA 17”*

The decision *TF v NI Public Services Ombudsman* [2022] NICA 17 is not currently published on the Judiciary NI website. It appears that the decision was originally published on that website and on the BAILII website but it was subsequently taken down from both websites. I understand that an application for anonymity was granted to the appellant in that case. I have had sight of the decision but I am unsure whether it is appropriate to comment on it in light of the anonymity granted to the appellant and the fact that the decision is no longer published on the Judiciary NI website. I would, however, briefly note that one of the grounds of appeal in *TF* was that the appellant had been denied a fair hearing because a request for an adjournment had been refused.

In *BD v Department for Communities (DLA)* [2017] NCom 32, Commissioner Stockman noted the following at paragraphs [21] to [24]:

**“Assessment**

*21. I observe that jurisprudence from the relatively distant past indicates that there is no obligation on the tribunal to provide an interpreter at a hearing. For example, in R(I)11/63, at paragraph 19, the Great Britain National Insurance Commissioner said “I am not prepared to accept the solicitors’ contention, in support of which no authority has been cited, that in these proceedings it was the duty of anyone other than the claimant to provide an interpreter”.*

22. *There is an unambiguous right to an interpreter in criminal proceedings, both at common law (see R v Lee Kun [1916] 1 KB 227) and since the commencement of the Human Rights Act 1998 (see Kamasinski v Austria [1991] 13 EHRR 36). However, I am not aware of any authority to this effect in respect of tribunal proceedings. Nevertheless, it appears that the Secretary of State for Work and Pensions accepted in CDLA/2748/2002 that the principles applying to criminal proceedings under Article 6(3)(e) of the European Convention on Human Rights (ECHR) are also applicable to all hearings within the scope of Article 6(1).*
23. *This position appears to be put into practical application by the Northern Ireland Courts and Tribunals Service (NICTS). In material appearing on the NICTS website, it is stated:*

*Other Proceedings – Non English Speaking*

*In relation to civil and family proceedings, when an action is privately funded, the party requiring the services of an interpreter must normally make the arrangements and meet the costs. NICTS will, however, arrange for foreign language interpreters for non-English speaking parties in civil and family proceedings in the following circumstances –*

- In alleged domestic violence cases or cases involving children;*
- In committal cases where the individual whose liberty is in jeopardy does not understand or speak English.*

*In other civil and family cases, (including Tribunal Hearing) NICTS will arrange and fund an interpreter where the judge directs that an interpreter be arranged*

*by the court – e.g. in cases where the party cannot understand the language of the court well enough to take part in the hearing and in cases where the party cannot get public funding and cannot afford to fund an interpreter privately...*

*24. Therefore, in practice, it is normal for an interpreter to be provided where necessary to enable an appellant to take part in proceedings effectively.”*

I would add that the NICTS website also states the following:

*“Other Proceedings – Deaf and Hearing Impaired*

*NICTS will also arrange and pay for interpreters in all civil, family, coroners, tribunal hearings and Enforcement of Judgment interviews/hearings for deaf and hearing impaired persons to ensure the fullest compliance with the Disability Discrimination Act 1995 and UN Convention on the Rights of Persons with Disabilities.*

*Where a person has multiple communication disabilities, such as deaf-blindness or speech and hearing disabilities, we will work with them to ensure that their interpretation needs are met as effectively as possible.*

*NICTS is committed to providing an efficient and effective in-court interpretation service to meet the needs of non-English speakers and deaf and hearing impaired court users.”*

In *Perera v Secretary of State for the Home Department* [2004] EWCA Civ 2002, the Court of Appeal in England and Wales heard a case where the appellant’s representative had written to the adjudicator prior to the hearing to request a different interpreter. The interpreter assigned to the hearing had recently acted as an interpreter in a different appeal the representative had been involved in, and the representative claimed that the interpretation had been “wrong” on that occasion. The adjudicator refused the representative’s request. The Court dismissed the appeal. While *Perera* differs from the instant case in the respect that the appellant in *Perera* attended his appeal after the

request for a change of interpreter was denied, the Court's decision does nonetheless confirm that a denial of a request for a change of interpreter on the ground of a concern that the appellant will not be able to communicate effectively through the assigned interpreter is not an automatic infringement of the appellant's right to a fair hearing.

I observe the Upper Tribunal has said in *TS (Eritrea) v Secretary of State for the Home Department* [2019] UKUT 352 (IAC)) that, if a representative challenges the competence of an interpreter at a hearing, the tribunal judge must address the matter as an aspect of the judge's overall duty to ensure a fair hearing. The Upper Tribunal stated at [47]:

*"47. A challenge by a representative to the competence of a Tribunal-appointed interpreter must not be made lightly. If made, it is a matter for the judge to address, as an aspect of the judge's overall duty to ensure a fair hearing. Amongst the matters to be considered will be whether the challenge appears to be motivated by a desire to have the hearing aborted, rather than by any genuine material concern over the standard of interpretation."*

Of course, it is not axiomatic that a challenge made to the competence of a Tribunal-appointed interpreter must result in a new interpreter being assigned in order to preserve the appellant's right to a fair hearing. It is a matter for the tribunal chairman to decide on the particular facts of the case. The general principles set out by the Upper Tribunal at [41] to [51] of *TS* make this plain enough, albeit most of the principles envisage a scenario where the appellant attends the hearing.

The tribunal has cited case law which primarily concerned a complaint that a refusal of an adjournment infringed on the appellant's right to a fair hearing, so it evidently did consider the impact that refusing to adjourn would have on the appellant's right to a fair hearing. The tribunal was satisfied, after hearing evidence from the interpreter, that she had sufficient experience and qualifications to interpret on behalf of the appellant. I submit that it was entitled to make this finding. I note that this may not have been the end of the matter had the appellant attended the appeal. If she had attended and then she or her representative expressed concern about the standard of the interpretation

during the hearing, it would have been open to the tribunal to adjourn and arrange for a new interpreter regardless of any prior finding that the interpreter was sufficiently experienced and qualified to perform the task.

Ms Rothwell-Hemsted submits that the LQM was unable to investigate whether there was “sufficient understanding” in the absence of The appellant, which is to be read in the context of the *CDLA/2748/2002* decision in which Commissioner Williams found that it was not adequate for a tribunal to find that it had “sufficient understanding” of what the appellant was saying in a case where the interpreter was found to have shown signs of indifference while interpreting during the appeal. I submit that the facts of the case in *CDLA/2748/2002* are sufficiently different to the facts of the instant case that the decision is of limited, if any, relevance to the appellant’s appeal. In respect to Ms Rothwell-Hemsted’s point that the LQM was unable to investigate whether there was “sufficient understanding” in the absence of the appellant, I am not certain how she believes tribunals should proceed under these circumstances. If her position is that, as tribunals cannot definitively establish whether they will be able to sufficiently understand an appellant’s evidence unless the appellant is actually present at the appeal, tribunals are under an obligation to adjourn and arrange for a new interpreter, I cannot agree with that in light of the costs of adjourning an appeal, the fact that it would, as the LQM apparently put it, effectively allow appellants to “pick and choose” the interpreter, and the principles set out in *TS*.

Ms Rothwell-Hemsted has pointed out that the tribunal did not address the interpreter referring to concerns raised by the deaf community and rumours about her skill as an interpreter. Her notes from the hearing record that the LQM “*read out [a] sentence from my email outlining claim concern that [the interpreter] known not to fully understand deaf people.*” It is not clear to me that the “concerns” and “rumours” addressed by the interpreter added anything new to what was said in the email of 16 September 2022 about the interpreter being “known” not to understand deaf people. Her response to those concerns seems to be adequately summarised in the record of proceedings. The tribunal stated that the appellant had “*provided no basis for her criticism of the interpreter*”. Evidently it did not give weight to unsubstantiated rumours about the interpreter’s competence in comparison to the interpreter’s evidence of her qualifications and experience. I submit that it was entitled to do so.



**Ground 4: Refusal to consider adjournment requests was a breach of natural justice**

Ms Rothwell-Hemsted cites Commissioner Stockman's decision in *DJS v Department for Communities (PIP)* [2021] NICom 22, in which the Commissioner held that a LQM considering whether to proceed in the absence of an appellant must have regard to all the circumstances of the case. He said at paragraph [37] that:

*“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.”*

Ms Rothwell-Hemsted submits that, by refusing to adjourn, the LQM made a mistake in law, disregarded the appellant's right to a fair hearing, disregarded other relevant matters, and refused a request for the Department to be directed to produce materially relevant evidence. She further submits that the tribunal's decision to proceed with the hearing was outside the bounds of reasonable decision making and gave rise to injustice, both due to the claimant's reasons for not attending and the absence of materially relevant evidence which had been requested from the Department.

One of the two grounds on which Ms Rothwell-Hemsted sought an adjournment (I will address the issue of adjournment rather than postponement, although there is a lot of overlap between the two in any case) was the appellant's concern that she would not be able to communicate effectively at the hearing due to her concerns about the interpreter. I have addressed the tribunal's

decision not to adjourn due to the appellant's concerns about the interpreter in my observations on grounds 2 and 3. For the reasons stated there, I submit that the tribunal was entitled to decide not to adjourn so that a different interpreter could be arranged.

The second ground concerned the matter of evidence which Law Centre NI had requested from the Department on the appellant's behalf. Ms Rothwell-Hemsted's letter of 13 September 2022 indicates that the requested evidence included copies of the policies and procedures in place at Newtownabbey Jobs and Benefits Centre in relation to claimants with disabilities (particularly deaf claimants) at the time the appellant claimed UC, and CCTV footage from the Newtownabbey Jobs and Benefits Centre corresponding to the date and time The appellant made her claim. Ms Rothwell-Hemsted submits that, as the Department had access to this information and the appellant did not, there was an equality of arms issue. She has also cited the House of Lords' decision in *Kerr v Department for Social Development* [2004] UKHL 23, in which Baroness Hale emphasised the cooperative nature of benefits adjudication.

Ms Rothwell-Hemsted's argument before the tribunal, as set out in her letter of 13 September 2022, was that the appellant was unlawfully compelled to claim UC when she visited Newtownabbey Jobs and Benefits Office on 24 September 2018. She submitted that no reasonable adjustments were made for the appellant's disability, that no British Sign Language interpreter was made available, and that the appellant was directed to enter her details into a computer without knowledge that she was making a claim for UC and without receiving information or advice about the impact claiming UC would have on her income.

The tribunal stated at paragraph 23 of its statement of reasons:

*"The appellant's representative's argument involves two issues although she conflates. The first issue relates to whether the appellant was coerced into making a claim. She has suggested CCTV coverage, if it exists, may establish this. She wants to see any policies in relation to staff training towards customers. Given the detail required to make a claim it seems to me improbable that the appellant would be unaware of what she was doing on the*

*computer terminal. It also seems improbable that CCTV and details of any policies will advance the matter further. The burden of requiring this information in my view would be considerably [sic] and is unlikely to advance matters at issue. Ultimately, a valid claim was made and has been accepted by the Department.”*

Ms Rothwell-Hemsted has pointed out that, although her position is that the appellant may have been misadvised by Departmental staff working in Newtownabbey JBO, Law Centre NI has not used terminology such as coercion or “duress” (a term used by the tribunal in paragraph 25 of its statement of reasons).

My understanding is that the Department’s policy is to retain CCTV footage at Jobs and Benefits Centres for 28 days, after which the footage is disposed of unless there is a particular reason to retain it. As there was no reason to retain the footage from the day that The appellant made her claim to UC that I am aware of (the case papers do not indicate that the appellant notified the Department of any issue with her claim in the 28 days that followed the claim), it is highly unlikely that CCTV footage of The appellant making her claim still existed at the date of the hearing. It is not clear whether the tribunal was aware of this policy, but an adjournment for further evidence would almost certainly not have resulted in CCTV footage being provided by the Department due to it no longer being available (it is probable that any relevant policies in relation to disabled people would have been provided if the tribunal had adjourned with a direction for the Department to provide them). In respect to the equality of arms argument put forth by Ms Rothwell-Hemsted, there is a high probability that the CCTV footage no longer existed at the time that the decision under appeal was made, in which case the Department did not have access to the footage when making its decision or in making its submissions to the tribunal.

The tribunal made a finding that it was improbable, given the detail required to make a UC claim, that Ms Rothwell-Hemsted was “*unaware of what she was doing on the computer terminal*”. Once the tribunal had made that finding, it is difficult to see what purpose an adjournment would have served. Even if all of Ms Rothwell-Hemsted’s assertions in her letter of 13 September 2022 were found to be correct, the claim would still be a valid claim unless, as the tribunal noted at paragraph 25 of its statement of

reasons, the claim was made under duress or against her will.

I observe that Ms Rothwell-Hemsted's notes of the hearing state the following:

*“Me – outlined the case law in my correspondence dated 13/09/22 and previous correspondence from my predecessor at LCNI outlines these grounds of appeal - these cases held that where claimant was misadvised or wrongly moved to UC, with loss of SDP, EDP, etc. the difference in treatment not justified and can be compensated for loss.”*

However, there is no suggestion that the appellant [or her husband] have been “wrongly moved” to UC following an incorrect disallowance of their legacy benefits (as in the case of the claimants in *R (TD & Ors) v Secretary of State for Work and Pensions* [2020] EWCA Civ 218). Having read the case law cited by Ms Rothwell-Hemsted, I am unsure what “misadvice” occurred in those cases, and the decisions do not appear to have been contingent on incorrect advice being given to the claimants by the Department for Work and Pensions.

Even if it had been found to be the case that the Department misadvised the appellant, or failed to adequately explain the consequences of claiming UC to her (as an aside, I note that the current UC online claim process requires claimants to tick a box confirming that *“You understand that if you or your partner make a claim, any benefits you get now that are replaced by Universal Credit will stop. You will not be able to submit a new claim for the benefits that have stopped”*), but I am not certain whether this was part of the claim process at the time the appellant made her claim), the tribunal would not be in a position to provide an effective remedy after finding that she made a valid claim to UC.

It may have been conceivable that CCTV footage, if it existed, could have supported an argument that the claim was made under duress, but the tribunal took the view that this was sufficiently unlikely that it was not worth the ‘considerable burden’ of adjourning for that footage to be obtained. That burden includes considerations such as the substantial cost of a further hearing and the delay in the determination of another case whose place the adjourned hearing would take. I submit that the tribunal was entitled

to decide, in the circumstances of the case, that an adjournment was unnecessary.

**Ground 5: Misapplication and misunderstanding of the law**

Ms Rothwell-Hemsted submits that the tribunal materially misunderstood the law. She firstly draws attention to the tribunal's statement at paragraph 18 of its statement of reasons, in which it said that "*A claimant can amend their claim or withdraw their claim before a decision is made.*" Ms Rothwell-Hemsted states that this is legally and factually incorrect. She notes that the act of claiming UC ends entitlement to legacy benefits, and that withdrawing a claim before a decision on entitlement is made cannot reverse this. She points out that the lack of a legislative mechanism to reverse the impact on entitlement to legacy benefits is the reason why findings of fact were sought as to whether she was misadvised to claim UC.

The statement "*A claimant can amend their claim or withdraw their claim before a decision is made*" is, contrary to Ms Rothwell-Hemsted's assertion, correct, at least from a technical point of view. A claimant can indeed amend or withdraw their claim to UC at any time before the Department decides whether the claimant is entitled to an award of UC. However, while Mr and the appellant could have withdrawn their UC claim, they would have collectively been financially worse off had they done so. This is because, as Ms Rothwell-Hemsted has correctly stated, if a claimant's entitlement to a legacy benefit ends because they claimed UC, and the claimant subsequently withdraws their UC claim, the claimant's entitlement to a legacy benefit would not be reinstated.

In the case of [the appellant's husband], he was in receipt of an award of income-related ESA prior to the UC claim. When the appellant made a joint claim to UC on behalf of herself and [her husband] on 24 September 2018, income-related ESA was abolished in respect to [the appellant's husband] with effect from 24 September 2018 per article 39(1)(b) of the Welfare Reform (Northern Ireland) Order 2015 and article 6 of the Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 8 and Transitional and Transitory Provisions) Order 2017. Had [the appellant and her husband] then withdrawn their UC claim, income-related ESA would have remained abolished in respect of [the appellant's husband] with the effect that his previous award could not have been reinstated nor could he have

made a new claim for it (the appellant's award of contributory ESA was unaffected by her UC claim).

I submit that, in likelihood, the tribunal was aware that a claimant who claimed UC could not return to legacy benefits even if that claim to UC was withdrawn. I observe, for instance, that when summarising the decision of the High Court of Justice in England and Wales in *TP and AR (No.3) v Secretary of State for Work and Pensions* [2022] EWHC 123 (Admin) at paragraph 22 of its statement of reasons, it refers to the “*no turning back principal* [sic]” invoked by migration from a legacy benefit being triggered by a claim to UC and not, for example, by an award of UC.

Even if I am wrong about that and the tribunal did misunderstand the law in this respect, I submit in the alternative that the error was not material to the outcome. The tribunal, with the correct understanding of the law, would still have decided that the appellant made a valid claim to UC and that the correct rate of transitional protection was awarded by the Department.

Ms Rothwell-Hemsted also submits that the tribunal failed to fully address the case law submitted on the appellant's behalf and analyse its potential application to the facts of the present case. She states that the tribunal failed to make the findings of fact necessary to decide the appeal. She highlights that the LQM has distinguished the case of *TP and AR* from the present case on the basis that transitional payments were made to the appellant [and her husband]. Ms Rothwell-Hemsted states that these payments do not cover the full loss of income, and that this was the basis on which she relied on *TP and AR*. She notes that the LQM does not appear to have engaged with this argument.

[The appellant's husband]'s award of income-related ESA included an enhanced disability premium (EDP). The premium was payable to income-related ESA claimants who had limited capability for work-related activity (LCWRA) or was in receipt of either the highest rate of the Disability Living Allowance care component or the enhanced rate of the Personal Independence Payment daily living component.

The tribunal addressed *TP and AR* at both paragraphs 22 and 24 of its statement of reasons. It said:

“22. *The decision of TP [2022] EWHC 123 also referred to the distinction between*

*managed migration whereby the Department serves notice on a claimant that they must make a claim for Universal Credit and natural migration were [sic] a claimant chooses to make the claim. Paragraph 8 states that both types of migration involve the no turning back principal [sic]. The transitioned [sic] to Universal Credit is once and for all and cannot be followed by a reversion to a legacy benefit. Paragraph 9 states that this is set out in the Universal Credit Transitional Provisions Regulations 2014. The court went on to say that the statutory scheme did not provide at that stage transitional relief for cases of natural migration, even though this may result in a sudden drop off in the level of benefit. The decision referred to the subsequent recognition that this amounts to unlawful discrimination which had to be remedied. There then was the introduction of transitional relief, although it was argued on the facts of TP their situation was not covered and they remained at a loss.*

23. [not relevant to *TP* and *AR*]

*24. The second issue relates to the overall fairness occasioned by the transition from the claimant's legacy benefits on to Universal Credit. It is at this point that the two cited cases are relevant. Those cases did address a situation of disabled claimants who lost out financially on the transition and found a breach of their article 14 rights. However, in the appellant [sic] situation transitional legislation was introduced and payments made."*

The sentence "*However, in the appellant [sic] situation transitional legislation was introduced and payments made*" indicates that the tribunal took the view that the appellant's case could be distinguished from *TP* and *AR* on this basis. However, I note that the following was said in paragraphs [149] to [151] of *TP* and *AR* (the emphasis is mine):

*"149. The treatment about which *TP* and *AR* complain (along with any member of the SDP natural migrants group before 16 January 2019) stems from the requirement that they*

*had to migrate once and for all from legacy benefits to UC. They thereby suffered an immediate drop in income merely because they moved home to the area of a different local authority. **Subsequent changes in the legislation have not altered the simple point that all those in the position of TP and AR have suffered cliff-edge effects through ceasing to be entitled to legacy benefits. They became entitled retrospectively to SDP transitional payments which provided adequate transitional relief for the loss of SDP, but not EDP.** That treatment began before 16 January 2019 and persists. In addition, the transitional element (to which tapering applies under Regulation 55 of SI 2014 No. 1230) will be less than it would otherwise have been because it does not include anything referable to the loss of EDP.*

*150. The differences in transitional treatment between the SDP natural migrants group and other SDP recipients have been summarised in [53] and [55] above. It can be seen that changes in legislation after 15 January 2019 have not overcome the differences in treatment affecting members of that group. Throughout the three periods of analysis those members of the original group have received no transitional relief in respect of the loss of EDP. By contrast,*

- (i) Before the introduction of the gateway, those who moved home within the same local authority area continued to receive EDP;*
- (ii) While the gateway subsisted, all SDP recipients who moved home, whether inside or outside the same local authority area, continued to receive legacy benefits, including EDP. The introduction of the gateway prevented the number of SDP natural migrants from growing. The gateway provisions did not alter the extent of the difference in treatment;*



*(iii) When the gateway was removed on 27 January 2021, those who migrate naturally thereafter by moving home to a different local authority area are still treated more favourably than members of the original SDP natural migrants group. For example, someone who experienced a triggering event during the gateway period will have remained on full legacy benefits. If such a person experienced a further triggering event after 26 January 2021, whether or not of the same kind as the first, they will retain full legacy benefits (including EDP) down to the date of natural migration and only then will the SDP transitional element and tapering apply (see [93] above). But there is a second effect: from the date of natural migration such a person is treated less favourably in relation to transitional relief for loss of EDP than another SDP recipient who experiences a change of circumstance not amounting to a triggering event (e.g. by moving home within the same local authority area).*

*151. Accordingly, the differential treatment identified by Swift J in TP 2 (see e.g. [26] – [29]) between fixed-rate transitional payments and the continuation of legacy benefits persists. TP and AR, and those in a like position are less favourably treated by reason of being a natural migrant as compared with other persons in a “relevantly similar” or “analogous situation”. As Swift J pointed out, there is no material difference between the two groups being compared in terms of the disability needs of the SDP recipients or the nature of the relevant trigger events ([14], [51] and [55]). I entirely agree. The changes in the legislation will have produced changes in the composition of the comparator groups over time, but have not changed the essential nature of the differential treatment itself. **In any event, the differential treatment about which the original members of the SDP natural migrants group complain (taking into account the retrospective entitlement to***

***SDP transitional payments), occurred once and for all before 16 January 2019, and has continued since then.***

It is difficult to see how any meaningful distinction between *TP and AR* and the instant case can be made on the basis that [the appellant and her husband] became entitled to SDP transitional payments following natural migration to UC, given that the claimants in *TP and AR* also became retrospectively entitled to SDP transitional payments following natural migration to UC, and that it was found in *TP and AR* that differential treatment persisted after retrospective entitlement to SDP transitional payments.

I submit Ms Rothwell-Hemsted is also correct that the tribunal has failed to engage with her argument that, in essence, the transitional SDP payments do not cover the full loss of income caused by [the appellant's husband]'s migration from income-related ESA to UC. I note that at paragraph 5 of the grounds of appeal submitted on the appellant's behalf by Mr Michael Black of Law Centre NI, Mr Black stated that "*The Appellant is now appealing the decision not to provide full Transitional Protection for the loss of all other disability related premiums and elements.*" In her letter dated 13 September 2022, Ms Rothwell-Hemsted stated she intended to make submissions based on case law including *TP and AR*, which she summarised as follows:

*"... which held that the claimants were unlawfully discriminated against by the failure to cover the loss of the EDP and their full loss of income when providing transitional payments. At paragraph 196 the judge stated he was "not satisfied ... that the broad aims of promoting phased transition, curtailing public expenditure or administrative efficiency required the denial of transitional relief against the loss of EDP and SDP natural migrants."*

Ms Rothwell-Hemsted's notes of the hearing also state the following:

*"Me – outlined the case law in my correspondence dated 13/09/22 and previous correspondence from my predecessor at LCNI outlines these grounds of appeal - these cases held that where claimant was misadvised or wrongly moved*

*to UC, with loss of SDP, EDP, etc. the difference in treatment not justified and can be compensated for loss.”*

The tribunal has not, in my view, addressed this submission. No reference is made to the Department not providing transitional protection for the loss of EDP or any other premium (I also observe that no investigations were made into what premiums etc. the appellant and her husband were entitled to on legacy benefits, or into whether they remained financially worse off following their claim to UC after payment of the transitional SDP amount). The tribunal’s attempt to distinguish the instant case from *TP and AR* does not hold water and, in any case, does not engage the argument that the transitional arrangements do not protect [the appellant and her husband] against the loss of EDP.

The High Court found in *TP and AR* that regulation 63 of and Schedule 2 to the Universal Credit (Transitional Provisions) Regulations 2014 discriminated against SDP natural migrants in Great Britain by failing to provide transitional relief for the loss of EDP. As such, the legislation was incompatible with the *TP and AR* claimants’ rights under article 14 of the European Convention of Human Rights read with article 1 of the First Protocol to that Convention. However, no such finding had been made by a court in respect of the equivalent provisions in the Universal Credit (Transitional Provisions) Regulations (Northern Ireland) 2016. The tribunal itself did not have the power to make a declaration of the legislation’s incompatibility with Convention rights, as it is not a court as defined in section 4(5) of the Human Rights Act 1998. Therefore, I submit it was ultimately bound to apply the law as set out in the Universal Credit (Transitional Provisions) Regulations (Northern Ireland) 2016, which does not make provision for any transitional relief for a loss of EDP. I consequently submit that the tribunal’s apparent misinterpretation of *TP and AR* is not material to the outcome of the decision.

However, it does not follow that the tribunal’s failure to engage with Ms Rothwell-Hemsted’s argument is not an error of law. In a reported decision of a Commissioner in Great Britain, *R(IS) 12/04*, Commissioner Bano said the following at [14] and [15]:

*“14. Finally, it is necessary to consider the adequacy of the tribunal’s reasons. I agree with the Secretary of State that a tribunal’s*

*lack of any power to make a declaration of incompatibility is not a good reason for not dealing fully with Human Rights issues, particularly since a tribunal may have power in some cases to declare subordinate legislation to have been invalidly made – see Chief Adjudication Officer v. Foster [1993] 1 All ER 705 [reported as R(IS) 22/93]. The claimant in this appeal clearly went to considerable trouble to set out his arguments under the Human Rights Act clearly and comprehensively in response to the chairman’s direction, and I consider that he was entitled to a much fuller explanation of the tribunal’s reasons for rejecting his arguments than the very short passage at the end of the statement of reasons set out above. The reasons for the tribunal’s rejection of the claimant’s discrimination arguments are not apparent from the statement, and I therefore consider that, in all the circumstances, the tribunal’s reasons were inadequate.*

*15. I therefore allow the appeal on that ground alone but, for the reasons I have given, I make a decision to the same practical effect as that made by the tribunal.”*

I submit that, for similar reasons to those articulated by Commissioner Bano, the tribunal’s statement of reasons in the instant case is inadequate and that this amounts to an error of law.

#### **Ground 6: Inadequate reasons for the decision**

Ms Rothwell-Hemsted submits that the tribunal failed to consider materially relevant evidence that was held by the Department which would indicate whether the appellant made an informed choice when claiming UC, and instead relied upon assumptions about the UC system generally. She further submits that the tribunal failed to give adequate reasons for why it rejected the discrimination-based grounds of appeal.

For the reasons outlined in my observations on ground 5, I agree with Ms Rothwell-Hemsted that the tribunal failed to give adequate reasons for rejecting the ground of appeal based on discrimination and I support the appellant’s application for leave to appeal on this basis.

The argument that the tribunal failed to consider materially relevant evidence that was held by the Department overlaps with the fourth ground (i.e. that the tribunal erred by failing to adjourn to obtain said further evidence). The tribunal has addressed why it did not adjourn for the evidence in its statement of reasons. I rely on the submissions made in my observations on ground 4. I would also like to briefly note that the issue before the tribunal was not whether the appellant made an “informed choice” to claim UC. It was whether she made a valid claim to UC.

Ms Rothwell-Hemsted has not specified what assumptions the tribunal has made about the UC system. Given the use of the word “instead”, this might refer to an assumption that Departmental staff did not misadvise the appellant (as I noted in my observations on ground 4, even if the appellant had been misadvised this would not have made a difference to the outcome of the appeal). This may also refer to the tribunal’s finding that it was improbable that the appellant did not know that she was making a claim to UC due to the level of detail required to make a claim on the system (some evidence of the level of detail required can be found at tab 2 of the Department’s appeal submission, and as an experienced LQM it is highly likely that the LQM was familiar with the level of detail required for benefit claims in general). In any case, I submit that the tribunal was entitled to make the assumptions that it made.

#### **Ground 7: The tribunal reached conclusions not supported by evidence**

Ms Rothwell-Hemsted reiterates her argument that the tribunal reached a conclusion unsupported by evidence and instead relied upon assumptions made about the UC system and a view that the appellant was not misadvised. She again notes that the tribunal did not adjourn the appeal to obtain evidence which may have been relevant to the matter of whether the appellant was misadvised. Ms Rothwell-Hemsted also highlights the tribunal’s findings that it was improbable that the appellant did not know what she was doing on the computer terminal, and that the information which Ms Rothwell-Hemsted had requested from the Department would be unlikely to help matters. She submits that the LQM has deemed the evidence to be unhelpful without considering it at all. She further submits that the comments demonstrate a lack of understanding of how deaf claimants whose first language is British Sign Language struggle with written English and, in particular,

communication via email and online systems. She has submitted material highlighting reading difficulties in the deaf community.

In respect of Ms Rothwell-Hemsted's point that many deaf people struggle with written English, I observe that no submissions appear to have been made to the tribunal to the effect that the appellant had difficulty with reading, or that she did not understand that she was making a claim to UC specifically due to reading difficulties. I also note that the appellant made a successful claim to UC, which presumably means that she was able to read well enough to successfully navigate the process of claiming UC online. I submit that, on the evidence before it, the tribunal was entitled to find it improbable that the appellant did not know that she was doing on the computer terminal.

I have addressed the other arguments made by Ms Rothwell-Hemsted in my observations on the earlier grounds. I would briefly add that it is not correct that the LQM deemed the requested evidence "as unhelpful". He took the view that it was unlikely to advance matters at issue, and that obtaining it was not worth the considerable burden of adjourning the appeal. As I have submitted in my observations on ground 4, the tribunal was entitled to decide not to adjourn on that basis.

### **Assessment**

19. 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.
20. 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.
21. 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.
22. I observe that the Department offers support for the application on the basis outlined by Mr Clements above. In light of the Department's support, I grant leave to appeal.
23. It appears to me that there were some unsatisfactory aspects about the conduct of the proceedings as regards the BSL interpreter. However, it

also appears that the tribunal has not engaged with a principal issue raised by the appellant, namely the potential entitlement to enhanced disability premium (EDP) in the light of *TP & AR (No.3) v Secretary of State for Work and Pensions* [2022] EWHC 123.

24. It appears to me that this is a suitable case in which to exercise the discretion given to me by Article 15(7) of the Social Security (NI) Order 1998 to set aside the decision of the appeal tribunal without making a formal finding of error of law. I direct that the appeal shall be determined by a newly constituted tribunal.
25. That tribunal should be assisted by a Departmental submission engaging with relevant case law, including in particular *TP & AR (No.3)* and *FL v Secretary of State for Work and Pensions* [2024] UKUT 6.

(signed): O Stockman

Commissioner

24 June 2024