DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Birmingham First-tier Tribunal dated 17 October 2016 under file reference SC049/16/00624 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 5 January 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge or medical member previously involved in considering this appeal on 17 October 2016.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 5 January 2016).

(4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Birmingham within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> of the Secretary of State under appeal (see Direction (3) above).

(5) The District Tribunal Judge who makes directions for the re-hearing of this appeal may wish to consider making a request to the Appellant's GP for copies of medical notes for the relevant period.

(6) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary and what happens next

1. I allow the Appellant's appeal to the Upper Tribunal. The First-tier Tribunal's decision involves an error on a point of law. I set aside the Tribunal's decision.

2. The case now needs to be reheard by a new First-tier Tribunal (or "FTT"). I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new FTT will succeed *on the facts*.

3. So the new FTT may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes. The previous FTT may, or may not, have got to the right decision in this appeal on the merits; I simply cannot say.

The background to this appeal to the Upper Tribunal

4. On 5 January 2016 the Secretary of State's decision-maker ruled that the Appellant no longer qualified for employment and support allowance (ESA), awarding him 0 points in respect of the various physical and mental descriptors. On mandatory reconsideration that score was raised to 6 points (for standing and sitting), but that was plainly still insufficient to reach the threshold to qualify for ESA (15 points).

5. On 17 October 2016 the FTT dismissed the Appellant's appeal, having decided the case without a hearing. The FTT confirmed the score of 6 points for standing and sitting. The Appellant then appealed to the Upper Tribunal.

The proceedings before the Upper Tribunal

6. I subsequently gave the Appellant permission to appeal. In doing so, I observed as follows:

> "The grounds of appeal are arguable, e.g. as regards the Tribunal's decision on mobilising. In addition, regulation 29 requires tribunals to follow the procedure set out in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42. That procedure requires e.g. consideration of the range of work the claimant might be expected to do and whether undertaking that work (including the process of getting to and from work) would pose a substantial risk to e.g. the claimant's health. Has the Tribunal explained and justified its decision in this respect, notwithstanding the absence of mental health issues?"

7. Mr Peter Thompson, who now acts for the Secretary of State, supports the appeal, essentially on two grounds. First, as regards regulation 29, he agrees that the FTT did not give sufficient consideration to the risks associated with travelling to and from work or how the Appellant's hip problem might pose a potential risk. Second, as regards mobilising, he accepts that the FTT did not adequately explain how the Appellant could mobilise more than 200 metres reliably and repeatedly (and within a reasonable timescale) given his use of a walker to get about.

8. On that basis Mr Thompson requests that I allow the appeal, set aside the FTT's decision and send the case back for a fresh hearing before a new FTT. In those circumstances he does not need to address the other grounds of appeal.

9. The Appellant has made detailed written submissions which go mostly to the facts. In effect, he asks me both to allow the appeal to the Upper Tribunal and to

decide and allow the underlying appeal about his entitlement to ESA. However, given the need for medical input I do not consider the latter course of action is appropriate, and so I direct a re-hearing before a new FTT.

10. On balance I am satisfied that the FTT erred in law for the reasons set out above, despite the evident care that the FTT took with this appeal, and as shown by its otherwise detailed statement of reasons. I therefore allow the appeal, set aside the FTT's decision and remit (or sent back) the original appeal for re-hearing to a new Tribunal. I formally find that the FTT's decision involves an error of law on the grounds as outlined above.

What happens next: the new First-tier Tribunal

General guidance

11. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant is entitled to ESA (and, if so, at what rate). That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact. As I indicated at the outset, it may well be the previous FTT came to the correct decision on the merits of the appeal, but I express no view on that either way.

12. The Appellant has sent in copies of his latest medical prescriptions. However, the fresh FTT will have to focus on his circumstances as they were as long ago as January 2016, and not the position as at the date of the new FTT hearing, which will obviously be more than 18 months later. This is because the new FTT must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The decision by the Secretary of State which was appealed against to the FTT was taken on 5 January 2016. I also note the present case is a little unusual in two respects.

The GP's letters

13. The first respect is that there are two detailed letters on file signed by the Appellant's GP (pp. 10 and 50) – or at least I assume they are signed by the GP as the signature appears to be accompanied by the GP surgery's stamp. The FTT noted the letters were not on headed notepaper from the surgery and were prepared in the same font as the Appellant's own correspondence. The FTT "did not accept that they were prepared by the GP but may have been signed by him". Those findings of fact were eminently sustainable. However, the new FTT may need to be more explicit about such weight as it attaches to the letters in question. As Judge Lane observed in *TC v Secretary of State for Work and Pensions (DLA)* [2009] UKUT 142 (AAC):

> "15. It is the tribunal's task to assess what weight is to be given to evidence and as a specialist tribunal is well placed to do so. Its knowledge of the constraints operating on health care professionals who write reports is more acute than that of judges sitting without a medical presence. The covering letter to the GP, the GPs manner of expressing himself, an absence of clinical findings and the context of the evidence in relation to the other evidence are all to be weighed in light of the tribunal's practical experience and specialist knowledge of the exigencies of the doctor/patient relationship. It is to be remembered, of course, that a GP is neither a lawyer nor an inquisitor, is not expected to cross-examine his patients as if her were one, and has an interest in maintaining a good relationship with the patient."

The Appellant's medical records

14. The second unusual respect is that the FTT did not have access to the Appellant's GP records. An earlier FTT had adjourned, finding that "the tribunal required more medical evidence to make a decision in the absence of the appellant" (p.74). That FTT recorded that "the Appellant is strongly encouraged to attend for an oral hearing to assist the Tribunal to determine his appeal. It is not compulsory for him to attend but it is his own interests to do so" (p.75). That FTT also directed (impliedly subject, of course, to the Appellant's consent) the production of the GP medical records and relevant consultants' letters for the period from 1 January 2015 (p.75).

15. The Appellant did not return the consent form and another FTT judge issued further directions, repeating the request (p.76). Again the Appellant did not respond. The case was then listed for disposal without the medical records. It is, of course, the Appellant's perfect right not to consent to disclosure of his medical records. However, if he declines to consent, he may have to face possible adverse consequences.

16. In this context I note the following observations of Judge Mark in *EB v Secretary of State for Work and Pensions* (ESA) [2015] UKUT 358 (AAC):

> "9. I would add that it is not only the duty of the Secretary of State to help the tribunal to further the overriding objective of dealing with cases fairly and justly and to co-operate with the tribunal generally, it is also the duty of the claimant (rule 2(4) of the 2008 Rules). By refusing consent to the production of her medical records, the claimant was in breach of her obligations under regulation 2(4) and it would have been open to the tribunal either to make an order that unless she consented to their production a sanction would follow pursuant to rules 7 and 8 of the 2008 Rules, or to draw adverse inferences from the refusal to consent in assessing the weight of the claimant's evidence or of any medical evidence she might produce.
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> 10. The reasons given by the claimant for refusing to consent, basically that the records contained inaccuracies which were the subject of litigation elsewhere, did not justify the blanket refusal to consent. It was open to the claimant to consent but to draw the attention of the tribunal to the alleged inaccuracies and, insofar as the alleged inaccuracies are relevant to the issues before the tribunal, to any evidence supporting the claim that they are inaccurate. If the court proceedings are now resolved, the judgment of the court may be sufficient for this purpose."

17. While I have not had any argument on the point, I am troubled by the suggestion in paragraph 9 of that decision to the effect that a claimant's refusal to consent to the production of her medical records amounts to a breach of her duty to co-operate with the FTT (under rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685)). I say that given the importance that the law attaches to the confidentiality of an individual's medical records (recognised, for example, by Article 8 of the European Convention on Human Rights and the Data Protection Act 1998).

18. The reference to it being open to an FTT to draw an adverse inference is also a matter that needs to be treated with some care. As Upper Tribunal Judge Rowland explained in *Secretary of State for Work and Pensions v HS (JSA)* [2016] UKUT 272 (AAC) at paragraph 12:

> "Where there has been a failure to comply with a direction to provide evidence, a tribunal may well be entitled to draw an adverse inference against the offending party; that is to say that it may infer from the failure that the facts are not as the offending party says they are. However, it is not entitled to do so merely as a punishment. It is appropriate to draw an adverse inference only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction is that the evidence does not exist or would harm the offending party's case. Thus a warning that an adverse inference may be drawn from a failure to comply with a direction does not necessarily have the same effect as a warning that a case will or may be struck out or that a party will or may be barred from participating in the proceedings if there is a failure to comply."

19. After reviewing the relevant case law authorities, Judge Rowland continued as follows:

> "16. The fact that the drawing of an adverse inference is not a penalty and is permissible only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction is that the evidence does not exist or would harm the offending party's case may require a tribunal drawing an adverse inference to give reasons for doing so beyond merely stating that there has been a failure to comply with a requirement to produce evidence. I say "may" rather than "must" only because in the case of, say, the person required to produce a bank statement to show that no capital is held, the *only* reasonable inference of an otherwise unexplained failure to comply may be that the bank statement would in fact show that the claimant did hold capital sufficient to disqualify the person from benefit."

20. As Judge Rowland also observed, it may be more appropriate in such cases to bear in mind that social security cases involve an investigatory approach (see *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372 (also reported as R1/04 (SF)), with the result that the burden of proof itself is seldom of significance in such appeals. As Baroness Hale of Richmond held in *Kerr* (emphasis added):

> "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. <u>The claimant is the one who generally speaking can and must supply that information.</u> 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."

21. The Appellant may well consider that the letters he has produced from his GP 'prove his case'. Plainly the previous FTT did not consider that to be so. While he has every right to decline to consent to the production of his medical records, or rather the limited extracts directed by the FTT, he may be making it more difficult for himself evidentially to make out his case.

22. This may all be a reason for the District Tribunal Judge (who makes directions for the re-hearing of this appeal) to consider making a further request to the Appellant's GP for copies of medical notes for the relevant period, subject to the Appellant's consent. This may provide further and more relevant information to supplement the evidence already available. However, the decision on whether such

further evidence is required is best left to the good judgment of the District Tribunal Judge concerned.

Conclusion

23. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 19 July 2017

Nicholas Wikeley
Judge of the Upper Tribunal