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 London Fox Court First-tier Tribunal dated 12 December 2016 under file reference SC242/16/0999 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 decision of the Department for Social Development (now the Department for Communities) dated 7 April 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 members who were previously involved in considering this appeal on 12 December 2016.

(3) The Appellant is reminded that the new Tribunal can only deal with the appeal, including her health and other circumstances, as at the date of the original decision under appeal (namely 7 April 2016).

(4) If the Appellant has any further written evidence to put before the tribunal, this should be sent to the regional tribunal office in Sutton 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> under appeal (see Direction (3) above).

(5) 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.

(6) Case management for the re-hearing should be reserved to either a District Tribunal Judge or the Regional Tribunal Judge.

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

Introduction

1. I am allowing this appeal on the basis of what is sometimes known simply as a "facts and reasons" challenge. There will need to be a fresh hearing before a new First-tier Tribunal of the Appellant's appeal against the decision not to renew her award of disability living allowance. To that extent there is nothing unusual about the case.

2. However, I am also arranging for the Upper Tribunal's decision on this appeal to be posted on the Upper Tribunal (Administrative Appeals Chamber) website. This is because it is a useful reminder about the existence of reciprocal arrangements between Great Britain and Northern Ireland in appeals relating to social security matters.

The background to the appeal to the First-tier Tribunal

3. The Appellant is a young woman now aged 24. When living in Northern Ireland, a decision-maker in the Social Security Agency (SSA) made her an award of the middle rate of the care component of disability living allowance (DLA). That award ran from 8 April 2014 to 3 April 2016. The Appellant was then suffering from depression, generalised anxiety disorder, obsessive compulsive disorder and bulimia.

4. The Appellant subsequently made a renewal claim for DLA. On 7 April 2016 a SSA decision-maker refused the renewal claim, deciding there was no further entitlement to DLA as from 4 April 2016. This decision to refuse the renewal claim was confirmed on mandatory reconsideration on 4 May 2016.

5. On 10 May 2016 the Appellant wrote to the SSA in Belfast stating her wish to appeal. She added that her condition had got worse rather than better. She added she would need a hearing to be in London as "I am normally resident in NI but currently live in London as a student".

The First-tier Tribunal's decision

6. The First-tier Tribunal ('the Tribunal') heard the Appellant's appeal on 12 December 2016. The Tribunal Judge's admirably clear record of proceedings indicates it was a relatively lengthy hearing. The Tribunal dismissed the appeal and so confirmed the SSA's decision of 7 April 2016.

7. The Tribunal did not find the Appellant to be a credible witness in certain respects. In addition, the Tribunal's statement of reasons included the following passage:

> '6. We found that at the date of the decision the appellant was being treated by her GP with medication…and was about to start the weekly psychodynamic psychotherapy. The notes from her GP records indicate that in January 2016 she was coping day to day and did not have any thoughts of self-harm. In the evidence provided by the GP in March 2016 (in response to a request from the respondent) the GP refers to the appellant's medical conditions as "*generalised anxiety disorder"* and does not indicate that this impacts on her ability to function on a day to day basis. The report also states that her last act of self-harm was in 2012. We gave this report very significant weight in our assessment of the appellant's ability to function as it was proximate to the date of the decision and written by her GP with whom she says she has regular contact.
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> 7. It would appear that following the refusal of her DLA claim the appellant's mental health deteriorated "[She] reports that since her DLA was stopped her health has taken a

> significant dive due to the stress and resulting financial anxiety" (GP letter dated 15/09/16). Further, it is only following the decision that the issue of self-harm once again becomes live resulting in a suicide attempt in October 2016 after the appellant had been out drinking, and for which she texted her boyfriend immediately for help (having taken 36 cocodamol tablets). These are however events that post-date the decision and we are not persuaded that they are not [sic] evidence of the appellant's mental health situation at the date of the decision."

8. From that it is plain that the Tribunal found as a fact that there had been no instances of self-harm between 2012 and the date of decision in April 2016 but that there had been a significant deterioration in the Appellant's mental health thereafter.

The proceedings before the Upper Tribunal

9. Mr Stephen Penfold, the Appellant's representative from the Lewisham Refugee and Migrant Network, set out detailed grounds of appeal. In summary, they were that the Tribunal had found facts which were inconsistent with the evidence and had both failed to take into account relevant evidence and wrongly taken into account immaterial matters. These grounds were elaborated upon by reference to the GP's evidence held on the appeal file (both the GP's letter and reports and the surgery case notes). In essence, the point being made was that there was material before the Tribunal that the GP's report of March 2016 was inaccurate and not supported by other evidence on file.

10. I subsequently gave permission to appeal in the following terms:

> "The grounds of appeal are arguable. In one sense the grounds may face an uphill struggle, as credibility is quintessentially a question of fact for the first instance Tribunal to determine. However, if credibility findings are based on a material misunderstanding of the facts, that may point to a possible error of law. The FTT gave 'very significant weight' to the March 2016 GP report, immediately after noting that it had stated the last act of DSH was 4 years ago i.e. in 2012 (p.127). However, the September 2016 GP report referred to such incidents 'several times last year', i.e. presumably meaning in 2015 (p.168), which also is broadly consistent with the report at p.171. The reference to 4 years ago may have been correct as regards an OD, but not DSH – see notes at p.181.'

11. Mr Kevin O'Kane, the Secretary of State's representative in these proceedings, supports the Appellant's appeal to the Upper Tribunal. Mr O'Kane accepts that the First-tier Tribunal was entitled to find the Appellant's evidence to be inconsistent and exaggerated. However, the Tribunal had explicitly placed "very significant weight" on the GP's March 2016 report. The GP's report had certainly stated that there had been incidents "of self-harm, last time 4 years ago" (p.127). However, the patient's surgery notes for 11 January 2016 (pp.130 and 181) recorded "Reports she was feeling suicidal last night, so she took diazepam which made her feel better. Has taken 3 deliberate OD, but last time was 4 years ago. History of DSH [deliberate self-harm] – cutting or burning, has not done this for several months". In addition, the psychiatrist's letter of 4 August 2016 records that "she last self-harmed in June this year [2016] with cigarette burns to the forearm. She has previously self-harmed with overdoes and cutting/burning, but had not self-harmed for months prior to the incident in June."

12. Mr O'Kane therefore accepts that the Tribunal proceeded on a mistaken understanding as to the facts. It found that there had been no acts of self-harm between 2012 and the date of decision in 2016, whereas on closer examination the

evidence showed there had been no *overdoses* during that period, but there had been *other acts of self-harm* as recently as months previously.

13. Given the "very significant weight" attached to the GP's March 2016 report, I conclude that this finding amounted to an error of law. I also recognise that the GP listed the Appellant's diagnosis as being solely "generalised anxiety disorder". However, the surgery notes plainly record chronic regional pain syndrome as being the first diagnosis, which would be relevant to her day to day functioning. Whilst the surgery notes go on to record that the Appellant has "no thoughts today or harming herself; day-to-day is coping", the GP's final comment is "I will also refer this lady to psych because her case is complex and her doses of medication are high – I think she could do with some more specialist input".

14. I accordingly agree with both Mr O'Kane and Mr Penfold that the appeal should succeed. The Tribunal's decision is accordingly set aside, The Appellant's appeal will need to be re-heard by a fresh First-tier Tribunal, either in London (if she still lives there) or back in Northern Ireland (if she has returned). That takes me to the jurisdictional point.

The reciprocal appeal arrangements with Northern Ireland

15. For many years Great Britain and Northern Ireland have operated what are essentially identical social security regimes. However, as Northern Ireland has a separate legal system, the relevant legislation in Northern Ireland has been contained in parallel in different legal instruments. As the Tribunal of Social Security Commissioners in Northern Ireland noted in C13/03-04(IB)(T) (at paragraph 15), "Formal relations between the two systems are now dealt with by sections 87 to 89 of the Northern Ireland Act 1998". Section 87(1) of that Act places a duty on Secretary of State for Work and Pensions and the relevant Northern Ireland minister to "consult one another with a view to securing that, to the extent agreed between them, the legislation to which this section applies provides single systems of social security, child support and pensions for the United Kingdom."

16. I simply interpose here that the relevant Northern Ireland minister used to be the minister responsible for the Department for Social Development. However, since 8 May 2016 this has been renamed as the Department for Communities (under section 1(7) of the Departments Act (Northern Ireland) 2016).

17. Section 87 of the Northern Ireland Act 1998 seeks to enshrine and give effect to the so-called parity principle, namely that claimants should have the same rights wherever they happen to be in the United Kingdom and regardless of moving between Great Britain and Northern Ireland. As the Explanatory Memorandum to the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 2016 (SI 2016/287) sets out, this principle has both a substantive and a procedural dimension:

> "4.2 Underpinning the parity principle is the argument that, as people in Northern Ireland pay the same rates of income tax and National Insurance contributions as people in Great Britain, they are entitled to the same rights and benefits paid at the same rates. Also, when people move between the two territories, they should be able to enjoy the same entitlement to benefit generated by their National Insurance contributions and should not have to make another claim to the same benefit or return home if they wish to appeal an entitlement decision made in their home territory."

18. In recent years, however, while the parity principle still holds good, a major crack has developed in the mirror between the two regimes, in that various welfare reform

measures, notably the replacement of DLA with personal independence payment (PIP), were not introduced in Northern Ireland at the same time as in the rest of the United Kingdom. This explains why the current appeal concerns a claimant of working age who has a renewal claim for DLA rather than a new claim for PIP.

19. In the present appeal it will be recalled that the initial decision on the Appellant's DLA renewal claim was made by a SSA decision-maker in Northern Ireland. However, the Appellant had moved to Great Britain. An important feature of the parity principle is that a claimant should not have to make another claim for the same benefit or return home if they wish to appeal an entitlement decision made in their home territory. Thus on 5 September 2016 the President of Appeal Tribunals (in Northern Ireland) directed that the Appellant's appeal be transferred to Great Britain. I note that a copy of the President's direction is only to be found on the HMCTS administrative file and not in the appeal bundle issued to the parties. Given its jurisdictional significance, it should have been copied by HMCTS staff in Great Britain to the main bundle.

20. As a result, the conduct of her appeal fell to be the responsibility of HMCTS and the First-tier Tribunal in Great Britain, rather than The Appeals Service of Northern Ireland. The legal basis for this shift in responsibility, previously the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 (SI 1976/1003), is now the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 2016 (SI 2016/287, as amended). These Regulations are made under section 87(4) of the Northern Ireland Act 1998. Regulation 2 introduces Schedule 1 to those Regulations, which is (to give it its full title) the *Memorandum of Reciprocal Arrangements relating to Social Security between the Secretary of State for Work and Pensions, with the consent of the Treasury, of the one part and the Minister for Social Development (being the Northern Ireland Minister having responsibility for Social Security), with the consent of the Department of Finance and Personnel, of the other part*.

21. Article 3 of the Memorandum provides as follows:

> '**3.** Where the *determining authority* has made a decision relating to a claim for benefit arising under or in connection with the *legislation*, including a decision as revised or superseded,
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> (a) the decision may be revised or superseded; and
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> (b) any appeal from the decision may be determined
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> under and to the extent permitted by the *legislation* of the *territory* in which the claimant is, as if the decision had been made in that *territory*, notwithstanding that the decision was made in the other *territory*.'

22. The terms in italics are all defined in Article 1 of the Memorandum; "territory", for example, "means Great Britain or Northern Ireland, as the case may require". The effect is that, as explained by the DWP's Decision Maker's Guide (DMG), "A decision made in Great Britain or Northern Ireland can be revised, superseded or heard on appeal in whichever of the two countries the claimant is" (Volume 2, Chapter 7, Part 1, paragraph 07530). The example given in the DMG is that "A person claims DLA whilst in Great Britain but is disallowed. That person moves to Northern Ireland and the appeal can be heard in Northern Ireland". The present case is the other way round but the same principle still holds good. The DMG obverse example is covered by section 87(5) of the Northern Ireland Act 1998 and the Social Security (Great Britain Reciprocal Arrangements) Regulations (Northern Ireland) 2016 (SR No.149/2016, as amended).

23. I cannot leave this case without remarking that the overall quality of the SSA response to the appeal, along with the detailed nature of the internal recording of the reasons for the renewal decision taken in Northern Ireland, is of an appreciably higher standard than the First-tier Tribunal in Great Britain has become accustomed to in recent years. The SSA response sets out the history of the renewal claim clearly with detailed reference to both the relevant legislation and case law.

24. Finally, in this context the relevant legislation means the relevant *Northern Ireland legislation*. In its statement of reasons, the Tribunal referred to the provisions of sections 72 and 73 of the Social Security Contributions and Benefits Act 1992. That was technically a further error of law, although not a material one. The Tribunal should have referred to sections 72 and 73 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992. Given the parity principle, these are in the same terms as the Great Britain equivalents. So in terms of substantive outcomes, if not in form, the Tribunal applied the correct principles. However, the fundamental jurisdictional point is that this was a Northern Ireland appeal under which the Appellant's entitlement to DLA was subject to determination under the substantive Northern Ireland law albeit the appeal (and this onward appeal) was for convenience heard in Great Britain.

Conclusion

25. I 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 10 November 2017

Nicholas Wikeley
Judge of the Upper Tribunal