

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. CPIP/2208/2017

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (22 December 2016, Enfield, file reference SC 312/16/01934) involved no material error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, this appeal is **DISMISSED**.

REASONS FOR DECISION

Introduction

1. Every child entitled to Disability Living Allowance (DLA) must, by law, have an appointee. If the child becomes involved in the DLA-Personal Independence Payment (PIP) transfer process, what happens to their appointee? That is the issue raised in this case.

2. By operation of law, a DLA appointment made on the basis that the recipient of benefit was a child ceases to have effect (a) for the purposes of any appeal made during the DLA-PIP transfer process; and (b) if the young person is awarded PIP, for the purposes of that award. By contrast, transitional legislation converts other DLA appointments, made on the basis that a claimant is unable to act, into PIP appointments.

3. The Department for Work & Pensions (DWP) are well aware of the legal consequences for children and young people, in relation to appointees, of the DLA-PIP conversion process. They have developed a procedure to deal with it. The procedure is explained below in these reasons but, briefly, involves making an ‘unable to act’ DLA appointment before the DLA-PIP transfer process begins. Transitional legislation then converts this into a PIP appointment.

4. In the present case, the First-tier Tribunal was unaware of the DWP’s procedure. Before this case, I was also ignorant of it. The DWP should ensure that First-tier Tribunal appeal responses adequately explain and, if necessary, evidence the validity of any appointment for appellants who, as children, were entitled to DLA. If this is left unexplained, the relevant legislation would indicate that no one holds a valid appointment. Failing to explain that a child’s DLA appointee continues to have authority to act in relation to PIP matters is in no one’s interests. It can only lead to confusion and delay.

5. In these reasons:

- “child” means a person under the age of 16;
- “child appointment” means an appointment made on the basis that a DLA claimant is a child;
- “1987 (DLA) Claims and Payments Regulations” means the Social Security (Claims and Payments) Regulations 1987;
- “2013 (PIP) Claims and Payments Regulations” means the Universal Credit, Personal Independence Payment etc (Claims and Payments) Regulations 2013;
- “PIP Transitional Regulations” means the Personal Independence Payment (Transitional Provisions) Regulations 2013;
- “unable to act appointment” means an appointment made on the basis that a claimant is unable to act.

Background

6. As a child, Miss P was awarded DLA. As the law requires (see below), the Secretary of State made an appointment - Miss P’s mother.

7. As Miss P neared the age of 16, an invitation to claim PIP was issued. A copy of the invitation was not supplied to the First-tier Tribunal but a PIP disability questionnaire, completed by Miss P’s mother, was.

8. On 25 July 2016, the DWP wrote to Miss P’s mother. The letter began “I understand you’re acting for Miss [P]”, explained that Miss P did not meet the criteria for an award of PIP and stated her award of DLA would end on a specified date. The subsequent mandatory reconsideration notice also recorded the DWP’s understanding that Miss P’s mother was acting for her.

9. The notice of appeal to the First-tier Tribunal was completed by Miss P’s mother who wrote that the DWP-commissioned Healthcare Professional (HCP) “tricked” Miss P into giving certain answers and failed to consider “the whole picture”. Miss P’s mother added that she knew her daughter best, took her to all appointments and was aware of her present

situation. At an earlier stage, Miss P's mother had also supplied a letter setting out detailed criticisms of the HCP's report and the DWP's decision.

10. The First-tier Tribunal heard and dismissed Miss P's appeal on 22 December 2016. The tribunal proceeded on the assumption that mother was Miss P's appointee. The mother attended the hearing and gave oral evidence but Miss P did not attend.

Proceedings before the Upper Tribunal

11. Permission to appeal having been refused by the First-tier Tribunal, an application for permission was made to the Upper Tribunal. The application form contains two signatures, probably Miss P's and her mother's. By this stage, Harrow Law Centre had begun acting for Miss P and / or her mother. The Law Centre clearly assumed that Miss P's mother was her appointee. The written application argued:

- The First-tier Tribunal decided to proceed in Miss P's absence and, as a result, heard only from her mother;
- Miss P herself was largely excluded from the proceedings as a result of advice given to Miss P's mother by her then representative that her involvement was unnecessary;
- Miss P had become socially isolated and spent much of her time away from her mother. At the date of the tribunal hearing, they rarely saw each other. As a result, the appointee / mother innocently provided the tribunal with inaccurate evidence about Miss P;
- The tribunal acted unfairly by failing to consider adjourning with directions for Miss P to attend and give oral evidence.

12. If Miss P's mother was, in fact, her appointee for PIP purposes I could see no real prospect of these arguments succeeding. However, there was no documentary evidence before the First-tier Tribunal that Miss P's mother had been made her daughter's appointee for PIP purposes. If the mother was not Miss P's appointee and did not possess some other authority to act on her behalf, mother could only have had authority to present a case on Miss P's behalf if authorised by her to act as representative.

13. Given the PIP appointment rules – explained below – the absence of any evidence of mother's appointment for PIP purposes suggested that she might not have been Miss P's

appointee. I granted permission to appeal on the ground that, arguably, the First-tier Tribunal erred in law by failing to enquire into whether Miss P's mother was her appointee. The case also provided an opportunity for the Upper Tribunal to address the legal position regarding appointees for children and young people involved in the DLA-PIP transfer process.

Appointees for children involved in the DLA-PIP transfer process: law and practice

Legal framework

14. The Secretary of State for Work & Pensions agrees that the following accurately describes the appointee legal framework.

15. All child DLA claimants must have an appointee. Regulation 43(1) of the 1987 (DLA) Claims and Payments Regulations provides:

“(1) In any case where a claim for disability living allowance for a child is received by the Secretary of State, he shall...appoint a person to exercise, on behalf of that child, any right to which he may be entitled...in connection with disability living allowance and to receive and deal on his behalf with any sums payable by way of that allowance”.

16. In regulation 43, “child” means “a person under the age of 16” (regulation 43(7)).

17. The Secretary of State also has a separate power to make an appointment for any person who is “unable to act” in relation to DLA if certain other conditions are met (regulation 33, 1987 (DLA) Claims and Payments Regulations). Regulation 33 therefore authorises appointments for adult DLA claimants although it is not restricted to adult claimants.

18. The DLA-PIP transfer process applies once a DLA claimant attains 16. The general rule under regulation 3(3) of the PIP Transitional Regulations is that, once a “DLA entitled person” reaches the age of 16, the Secretary of State must send the person a notice inviting the person to claim PIP. Despite the connotations of ‘invitation’, the recipient has little option in practice but to respond by claiming PIP. A failure to do so will lead, firstly, to suspension of DLA (regulation 9) and, if a further opportunity to claim PIP is not taken, to termination of DLA (regulation 10).

19. For the purposes of the 2013 (PIP) Claims and Payments Regulations, “child” has the meaning in section 40 of the Welfare Reform Act 2012 namely “a person under the age of 16”.

20. The Secretary of State has power to make an appointment for a person who is, or may be, entitled to PIP, and is “for the time being unable to act” (regulation 57(1), 2013 (PIP) Claims and Payments Regulations). Certain additional conditions apply but, for present purposes, need not be mentioned.

21. The Secretary of State has no duty under the 2013 (PIP) Claims and Payments Regulations, of the type applicable to child DLA claimants, to make an appointment for child PIP claimants. Such a duty would be unnecessary, and pointless, since children cannot currently claim PIP (regulation 5, PIP Transitional Regulations).

22. DLA unable to act appointments are transformed, by law, into PIP unable to act appointments:

(a) where, immediately before a PIP claim is made by, or on behalf of, a person entitled to DLA, the person has a DLA unable to act appointment, the former appointee is to be regarded as acting on behalf of the person for the purposes of the PIP claim (regulation 28, PIP Transitional Regulations); and

(b) if a PIP transfer claimant is awarded PIP, the person who, under regulation 28 was regarded as acting on their behalf, is treated as having been appointed under regulation 57(1) of the 2013 (PIP) Claims and Payments Regulations to receive and deal with any sums payable to the claimant (regulation 29, PIP Transitional Regulations).

23. The upshot is that, while DLA unable to act appointments are effectively converted into PIP unable to act appointments, DLA child appointments are not converted into PIP appointments. They cease to have any effect once the child is no longer entitled to DLA.

Departmental practice

24. I am grateful to the Secretary of State's representative for setting out, in her response to this appeal, details of the practice developed by the DWP to deal with the legal fact that the DLA-PIP transfer process results in a child's DLA appointment having no effect for PIP purposes. However, it is regrettable that none of this was brought to the attention of the First-tier Tribunal in the present case (or, to my knowledge, in any other case).

25. The practice is described as follows:

“what happens is that when child recipients of DLA reach 15 years and 7 months, the...Department sends them what is known as a ‘PIP Initial Contact Letter’, (PIP 0.182). This incorporates a detachable appointee enquiry form which requires the claimant to indicate whether or not they would still need an appointee to act for them when they turn 16. If they indicate in this form that they would not need an appointee when they reach 16, the Secretary of State makes no new appointment, treats them as capable of managing their own affairs and deals with them directly for the purposes of their PIP claims and any subsequent processes connected therewith.

However, if claimants indicate on their appointee enquiry Form that they would need an appointee to act on their behalf when they reach 16 years of age, then the Secretary of State arranges a visit to enable a visiting officer from his department to ascertain

whether or not they lack the mental capacity to act on their own behalf on the basis that they are ‘unable to act’. Following this visit, if the Visiting Officer is satisfied that the child recipient of DLA would need an appointee to act for them when they turn 16, the Secretary of State then makes a new appointment under reg. 33 [of the DLA Claims and Payments Regulations] whilst they are still under 16 years of age. Any such appointment made at that stage then empowers the appointee to apply for PIP on behalf of the claimants when they turn 16 and manage any subsequent processes arising therefrom.

...Once a decision has been made..., an appointee authorisation form BF57...is completed, signed on behalf of the Secretary of State and sent to the appointee. This confirms that they have been formally appointed to act for the claimant”.

26. This is not the place to make any comment on the soundness of the procedure described above. It is not a matter in dispute in these proceedings and I have heard no argument on whether it is appropriate in general or corresponds with the regulations about appointments.

The arguments

Secretary of State

27. The Secretary of State concedes that she cannot supply a copy of any instrument by which Miss P’s mother was made her DLA appointee. Miss P’s DLA records are likely to have been disposed of. However, the representative has supplied copies of departmental records which indicate:

- (a) on 24 June 2003, 22 September 2005 and 17 September 2007, decisions were taken under regulation 43 of the 1987 (DLA) Claims and Payments Regulations making Miss P’s mother her appointee for DLA purposes. I observe that such appointment was required for Miss P, as a child, by regulation 43; and
- (b) on 17 March 2015, Miss P’s mother was made her appointee for DLA purposes under regulation 33 of the 1987 (DLA) Claims and Payments Regulations. The representative submits that the appointment must have been made on the basis that Miss P was ‘unable to act’.

28. The Secretary of State submits that, despite the absence of primary evidence, the (rebuttable) presumption of regularity applies in this case namely that public officials charged with statutory functions are presumed to discharge the functions properly. In *Earl of Derby v. Bury Improvement Commissioners* (1869) L.R. 4 Exch. 222 (cited with approval by the House of Lords in *R v Inland Revenue Commissioner & another, ex parte T.C. Coombs & Co* [1991] 2 A.C. 283), it was held:

“in the absence of any proof to the contrary, credit ought to be given to public officers, who have acted prima facie within the limits of their authority, for having done so with honesty and discretion”.

29. The mother’s appointment under regulation 33 of the 1987 (DLA) Claims and Payments Regulations led to her being regarded as acting for Miss P on her PIP claim, in accordance with regulation 28 of the PIP Transitional Regulations. Accordingly, the mother conducted Miss P’s appeal against the refusal of her PIP claim with proper lawful authority.

Miss P

30. For Miss P, Harrow Law Centre argue the Secretary of State’s failure to provide the First-tier Tribunal with evidence of her mother’s appointment was a breach of rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. Rule 24(4)(b) requires the Secretary of State’s response to provide all relevant documents. Evidence of Miss P’s mother’s appointment was clearly relevant and should have been provided under rule 24(4)(b).

31. The Law Centre concede their client has no evidence to rebut any presumption of regularity. While Miss P’s mother does recall being interviewed by the DWP to “confirm whether she wished to...continue acting as...appointee”, she does not recall receiving Form BF57 confirming her appointment. Nevertheless, the First-tier Tribunal should have enquired into whether Miss P’s mother held was a valid appointment and erred in law by failing to do so.

Conclusions

32. The First-tier Tribunal did not consider whether Miss P’s mother had authority to act on Miss P’s behalf for the purposes of her PIP appeal. At that stage, the issue had not crossed anyone’s mind.

33. Having considered the evidence supplied in the present proceedings, I find that Miss P’s mother did hold a valid PIP appointment for her daughter or, more precisely, under regulation 28 of the PIP Transitional Regulations she was to be regarded as acting on behalf of her daughter in her PIP appeal. Even if the First-tier Tribunal erred by failing to consider the issue, any error could not have been material.

34. I make the above finding for the following reasons:

- (a) if the presumption of regularity applies, it has not been rebutted. Miss P’s representative concedes this point;
- (b) if the presumption of regularity does not apply, I am satisfied, on a balance of probabilities, that in March 2015 Miss P’s mother was made her appointee under regulation 33 of the 1987 (DLA) Claims and Payments Regulations. Someone at the

DWP must have made the appointee entry in DWP departmental records and Miss P's mother recalls the standard pre-appointment visit by a DWP visiting officer. It is highly unlikely that, in the period between the visit and the entry being made in departmental records, no appointment was in fact made. Taken together, these features of the evidence lead me to conclude it is more likely than not that in March 2015 Miss P's mother was made an appointee under regulation 33. In fact, on the evidence, I do not think any other conclusion would be open to a reasonable fact-finder;

- (c) since a valid regulation 33 appointment was in existence when Miss P's PIP claim was made, regulation 28 of the PIP Transitional Regulations meant that Miss P's mother was to be regarded as acting for her;
- (d) assuming that the DWP were in breach of their duties under rule 24 by failing to disclose relevant appointment documents, the First-tier Tribunal's failure to address whether the mother had authority to act could not have been a material error on a point of law. Had the matter been investigated and the available evidence supplied, the only reasonable conclusion open to the tribunal would have been that Miss P's mother had authority to act on her behalf.

35. The First-tier Tribunal did not err in law by taking Miss P's mother's evidence at face value. Before the tribunal, it was not suggested that the mother had limited knowledge of her daughter's circumstances at the relevant time. In fact, Miss P's mother argued the opposite when she completed Miss P's notice of appeal to the tribunal.

36. In conclusion, I decide that the First-tier Tribunal's decision did not involve a material error on a point of law. However, I would strongly recommend that, in other appeals involving children and young people involved in the DLA-PIP transfer process, the DWP properly explain and, if necessary, evidence the basis for any appointment.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
9 October 2018