[2018] AACR 33

(RH v Secretary of State for Work and Pensions (DLA)
[2018] UKUT 48 (AAC))

Judge Rowland **CDLA/998/2017**
12 February 2018

Appointment to act – whether claimant with appointee precluded from bringing an appeal independently – whether First-tier Tribunal having power to appoint a litigation friend

The claimant, who suffered from agoraphobia, depression and paranoid schizophrenia was awarded disability living allowance ('DLA'). He made a renewal claim in 2004 through his mother who had been appointed to act on his behalf in 1999 by the Secretary of State under regulation 33 of the Social Security (Claims and Payments) Regulations 1987 (the '1987 regulations'). He was awarded an indefinite award of the middle rate of the care component and the lower rate of the mobility component with effect from May 2005. In late 2009, Medway Borough Council, seemingly at the claimant's request, applied to become his appointee and was appointed by the Secretary of State despite objection from the appointee mother on the basis that the claimant lived with her and she was his main carer. There was no evidence that the mother had received formal notice of her removal as appointee although the payments of DLA to her ceased and were made instead to Medway Borough Council from its appointment in 2009. The Council subsequently informed the Secretary of State that the claimant was in hospital from October 2010, that he was discharged in early 2011, that he was living with his mother from March 2012, that he was returned to hospital in January 2015 and, on 26 October 2015, that he had moved into a "residential home" in September 2015. Payment of DLA had ceased from 25 February 2015 and the decision of the Secretary of State on 16 December 2015 resulted in the payment of arrears of the mobility component from 30 September 2015 but gave rise to the appeal to the First-tier Tribunal brought by the claimant's father as the claimant's representative on the ground that the Secretary of State had not been entitled to "withdraw" payments of DLA from 25 February 2015. The Secretary of State's decision was upheld and the claimant through his representative father applied to the Upper Tribunal for permission to appeal. The Upper Tribunal invited argument as to who the parties had been in the First-tier Tribunal and whether the claimant had an independent right of appeal to the Upper Tribunal while a person had been appointed to act on his behalf. The claimant's father argued that the claimant had had capacity to appoint him as a representative. The Secretary of State and the Council submitted that there was doubt as to the claimant's capacity but that in any event the claimant had an independent right to appeal to the Upper Tribunal notwithstanding that the Council had been appointed to act on his behalf and, if he lacked capacity, the Upper Tribunal could appoint one of his parents as a litigation friend to represent him. Both parents declined to be appointed as a litigation friend on the ground that their son had capacity to act on his own behalf. The claimant's father also refused to continue acting as his representative and had unsuccessfully applied to be allowed to intervene in his own right. The claimant's mother argued that she was still the claimant's appointee because her appointment had not been properly revoked or, alternatively, that she should be allowed to intervene in the proceedings in her own right.

Held, refusing the claimant's mother's application to be substituted or joined as a party to the proceedings and dismissing the application for permission to appeal, that:

1. there cannot properly be more than one appointee at a time acting in place of the claimant in respect of a single benefit and, despite the claimant's mother not having been given notice of the termination of her appointment and the lack of any written record of the Council's appointment, it had been shown that the Council had been appointed in her place because the Council had been treated as the appointee and had acted as such since 2009 (paragraph 26);

2. it was not appropriate for a parent with no independent interest in the substantive application concerning their child's entitlement to DLA to be granted permission to intervene and if such a parent was to be allowed to participate it should be in the capacity of representative, appointee or litigation friend with a duty to act on the child's behalf or in his interests (paragraph 28);

3. the cumulative effect of section 12(2) of the Social Security Act 1998 and regulation 25(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI/1999/991) was such that the mere fact that there has been an appointment under regulation 33 of the 1987 regulations did not preclude a claimant from bringing an appeal his or herself, a lack of capacity to bring an appeal not being an insuperable problem because, where a person lacks capacity to bring or respond to an appeal, the First-tier Tribunal has the power to

appoint a litigation friend and must if necessary exercise that power to avoid a breach of the rules of natural justice and Article 6 of the European Convention on Human Rights (as per Ryder LJ in *AM(Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123; [2018] 2 All E. R. 350) (paragraphs 29 to 31);

4. a finding that a claimant did have capacity would not result in an appointment under regulation 33 being quashed and the appointee would be a party to the appeal (paragraph 34);

5. it was not necessary to decide whether the claimant in this case had capacity because, if he had capacity, he had had an opportunity to take part in the proceedings and, if he lacked capacity, he was adequately protected by having the Council as his appointee given that no-one else currently wished to act on his behalf (paragraphs 40 to 45).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The claimant neither appeared nor was represented.

The Secretary of State was represented by Ms Nicola Greaney of counsel, instructed by the Government Legal Department

Medway Borough Council was represented by Mr Oliver Lewis of counsel, instructed by Medway Council Legal Services

Decision:

The claimant's mother's application to be substituted or joined as a party to the proceedings or to be allowed to intervene is refused.

Medway Council's application that the case be transferred to the High Court is refused.

All other requests for directions are refused.

The claimant's application for permission to appeal is refused.

REASONS FOR DECISION

1. This is an application by the claimant for permission to appeal against a decision of the First-tier Tribunal dated 20 January 2017, whereby it dismissed his appeal against a decision of the Secretary of State dated 16 December 2015, the precise terms of which are not entirely clear but which appears to have been to the effect that, although the claimant was entitled to both the middle rate of the care component and the lower rate of the mobility component of disability living allowance, neither component was payable from 25 February 2015 to 29 September 2015 and only the mobility component was payable from 30 September 2015.

The facts

2. The claimant was born in 1976. Unfortunately, he has suffered from mental illness for a long time, possibly since his late teens. On 4 August 1999, his mother signed an application

to the Secretary of State for appointment to exercise on behalf of her son any rights that he might have under "the Social Security Acts". She said that her son was mentally disturbed and was unable to manage his own affairs anymore and an appointment was made on the same day under regulation 33 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) (the "1987 Regulations"), which in its current form provides –

> "**33.**— (1) Where—
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> (a) a person is, or is alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf; and
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> (b) that person is unable for the time being to act; and either
>
> (c) no deputy has been appointed by the Court of Protection under Part 1 of the Mental Capacity Act 2005 or receiver appointed under Part 7 of the Mental Health Act 1983 but treated as a deputy by virtue of the Mental Capacity Act 2005 with power to claim, or as the case may be, receive benefit on his behalf; or
>
> (d) in Scotland, …,
>
> the Secretary of State or the Board may, upon written application made to him or them by a person who, if a natural person, is over the age of 18, appoint that person to exercise, on behalf of the person who is unable to act, any right to which that person may be entitled and to receive and deal on his behalf with any sums payable to him.
>
> (1A)….
>
> (2) Where the Secretary of State has made or the Board have made an appointment, or treated an appointment as made, under paragraph (1)—
>
> (a) he or they may at any time revoke it;
>
> (b) the person appointed may resign his office after having given one month's notice in writing to the Secretary of State or the Board of his intention to do so;
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> (c) any such appointment shall terminate when the Secretary of State is notified or the Board are notified that a receiver or other person to whom paragraph (1)(c) or (d) applies has been appointed.
>
> (3) Anything required by these regulations to be done by or to any person who is for the time being unable to act may be done by or to the receiver, judicial factor or guardian, if any, or by or to the person appointed under this regulation or regulation 43 (disability living allowance for a child) and a direct credit transfer under regulation 21 into the account of any person so appointed, or the receipt by him of a payment made by some other means, shall be a good discharge to the Secretary of State or the Board for any sum paid."

3. I do not know when the claimant was first awarded disability living allowance but he made a renewal claim in late 2004. That form was signed by his mother, as appointee, and it states that the claimant was suffering from agoraphobia and depression and also a mental illness that a community mental health nurse identified in an accompanying statement as

paranoid schizophrenia. On 1 February 2005, an indefinite award of the middle rate of the care component and the lower rate of the mobility component was made with effect from 26 May 2005.

4. In late 2009, Medway Borough Council applied to become the appointee (docs 64-75). Precisely what prompted the application is a matter of contention. The local authority has produced copies of a typed letter dated 25 August 2009 in which the claimant, from an address in Faversham, allegedly gave "permission for my … Project Worker or Local Services Manager to act on my behalf in matters to do with my benefit claims and queries about my benefit claims" (doc 63) and another letter dated 9 September 2009 in which, from the same address, the claimant stated that he had decided that he wished to have the appointeeship transferred from his mother to "the local authority" and gives as a reason his desire "to develop a better relationship with my mother, avoiding arguments about money" (doc 266). The claimant's father appears not to accept that those letters were signed by the claimant or represented his wishes. In any event, the Secretary of State wrote to the claimant's mother on 15 November 2009 asking whether she would relinquish her role as appointee. (She was told that the application had been made by Kent County Council but that appears to have been a mistake, possibly made because Faversham lies outside Medway Council's area.) She made it quite clear that she would not voluntarily relinquish her role as she was her son's main carer and he lived with her (within Medway Council's area) (docs 76-78). Nonetheless, the Secretary of State appointed Medway Council to act on behalf of the claimant. There is no evidence before me that a letter was written to the claimant's mother revoking her appointment or that she was ever given any reasons for the decision. However, the Secretary of State ceased making payments to her and instead made them to Medway Council. Medway Council duly informed the Secretary of State when the claimant was admitted to hospital on 5 October 2010 and then was discharged on 20 January 2011 and it later informed him that the claimant had moved back to his mother's address on 22 March 2012 (docs 81 to 83).

5. On 2 February 2015, Medway Council informed the Secretary of State that the claimant had been admitted to hospital on 24 January 2015 (doc 84). In consequence, the Secretary of State ceased making payments of disability living allowance to Medway Council with effect from 25 February 2015 (the first Wednesday after 28 days had elapsed). On 26 October 2015, Medway Council informed the Secretary of State that the claimant had moved into what it described as a "residential home" on 25 September 2015. This resulted in the decision dated 16 December 2015 that has led to this application for permission to appeal. There is no copy of the decision in the documents before me and its terms are unclear. It plainly was not in the terms suggested either by the contemporaneous note of the reasons for decision (doc 86) or by Section 3 of the Secretary of State's submission to the First-tier Tribunal (doc C), because it was obviously concerned with the payability of disability living allowance rather than its underlying entitlement. In any event, it led to a payment of arrears of the mobility component for the period from 30 September 2015 (the first Wednesday after the claimant's move to the care home), but not to the payment of the care component for that period or of either component for the period from 25 February 2015 to 29 September 2015.

6. What is not entirely clear is whether the decision of 16 December 2015 was made in respect of both the period before 30 September 2015, while the claimant was in hospital, and the period from that date, while he was residing in a care home, or with just the latter period. A screen shot (doc 228) suggests that the cessation of payments while the claimant had been in hospital had been authorised by a separate decision made on 3 February 2015, but that may well have been a mere suspension under regulation 16 of the Social Security and Child

Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) (the "1999 Regulations"), rather than a supersession under section 10 of the Social Security Act 1998 and regulation 6(2)(a)(ii) of the 1999 Regulations, since it cannot then have been known for how long the claimant would remain in hospital. Medway Council does not appear to have received any notification of the decision of 3 February 2015. The precise nature of the decisions of 3 February 2015 and 16 December 2015 does not really matter in this case because, when Medway Council applied for what the Secretary of State calls "mandatory reconsideration" – technically, consideration of revision under section 9 of the 1998 Act as a necessary precursor to an appeal under section 12 – the decision-maker considered payability both while the claimant was in hospital and after he had moved to the care home, even though he or she seems wrongly to have considered that only the payability of the care component from 30 September 2015 was in dispute (see the "mandatory reconsideration notice" (docs 90 to 92)). As the time for applying for revision may be extended, the decision-maker's approach was quite permissible whether there had been supersession decisions on two separate dates or on just one and the consequence was that the First-tier Tribunal had jurisdiction to consider, and did consider, the payability of disability living allowance during both the stay in hospital and the stay in the care home.

7. The application for revision was made by Medway Council at the prompting of the claimant's father, it being argued that further arrears were due because notice of the stopping of payments had not been received until the decision of 16 December 2015 was made. In the course of considering the application, the decision-maker telephoned Medway Council for clarification of the grounds and it was confirmed in the course of the ensuing conversation that Medway Council funded the claimant's residence in the care home (doc 88). The refusal to revise the decision of 16 December 2015 and, if necessary, the decision of 3 February 2015 was contained in a mandatory reconsideration notice which was sent to Medway Council and a copy of which Medway Council provided to the claimant's father.

The proceedings before the First-tier Tribunal

8. Armed with that notice, the claimant's father lodged on 17 February 2016 a notice of appeal, signed by the claimant, in which it was stated that the claimant appointed his father as his representative and it was argued that the Secretary of State had not been entitled to "withdraw" any payment of disability living allowance between 24 January 2015 and 16 December 2015 because neither the claimant nor Medway Council had been notified of the suspension of payments until the latter date. It was also asserted that rule 10 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) (the "First-tier Tribunal Rules") breached Article 6 of the European Convention on Human Rights, given that the claimant was under a disability. No reason for that assertion was given, and it has not been repeated in this application for permission to appeal, and so I will say no more about it.

9. It appears that the claimant's father had been prompted to seek the revision of the decision of 16 December 2015 and to lodge the appeal against it because he was acting as the claimant's mother's representative in her appeal against a decision dated 22 August 2015 that she was not entitled to carer's allowance from 2 March 2015 because disability living allowance was no longer payable to her son. In any event, the First-tier Tribunal, having had its attention drawn to the claimant's lack of capacity, directed that there be an oral hearing of both appeals together and further directed the Secretary of State to tell it whether the claimant had an appointee and, if not, to consider appointing his father to act on his behalf. It appears

that the Secretary of State informed the First-tier Tribunal that Medway Council was the appointee and thereafter the First-tier Tribunal named the appointee as the appellant in the proceedings. This may have been a result of the clerical up-dating of its computerised case-management system and it certainly does not appear to have been the result of any judicial decision. In any event, Medway Council in fact appears not to have communicated with the First-tier Tribunal at all and the First-tier Tribunal continued to treat the claimant's father as a representative, giving both Medway Council and the claimant's father notice of the hearing.

10. Nonetheless, neither Medway Council nor the claimant's father appeared at the hearing before the First-tier Tribunal on 20 January 2017 although the Secretary of State did so, having been directed to send a presenting officer. The First-tier Tribunal dismissed the appeal and upheld the Secretary of State's decision and, on 9 February 2017, provided a statement of reasons. On 23 February 2017, it refused the claimant permission to appeal.

The proceedings before the Upper Tribunal

11. On 22 March 2017, the Upper Tribunal received an application for permission to appeal. As in the proceedings in the First-tier Tribunal, the claimant signed the form and appointed his father as his representative. Nine issues were raised as grounds of appeal (docs 141 to 143) and an oral hearing was requested. On 28 March 2017, the Upper Tribunal also received an application for judicial review of the First-tier Tribunal's refusal of permission to appeal, again signed by the claimant and appointing his father as his representative. It named the Secretary of State, Medway Council and the claimant's mother as interested parties.

12. On 13 April 2017, I considered both applications and issued case-management directions, saying that four of the issues raised in the application for permission to appeal ("issues 1, 2, 4 and 5") amounted to "fundamental issues as to who the parties were before the First-tier Tribunal and accordingly whether the Applicant has any right of appeal to the Upper Tribunal" and I will consider them below. There is nothing I need add now to what I said then as regards "issue 3" and I will not repeat it. I will deal further below with "issues 6 and 7", which were the only challenges to the substance of the First-tier Tribunal's decision and the latter of which was the ground upon which the claimant originally appealed to the First-tier Tribunal. "Issue 8" complained of unspecified breaches of procedural rules, statutory duty and the European Convention on Human Rights and does not appear to add to the other issues. As regards it and "issue 9", which challenged the First-tier Tribunal's refusal of permission to appeal, I suggested that the fears expressed by the claimant were unfounded and that the judicial review proceedings were unnecessary. (I adhere to that view and am accordingly today refusing, in a separate decision on file JR/997/2017, permission to apply for judicial review.)

13. I also made some observations regarding the decisions made in the claimant's mother's appeal against the supersession and termination of her award of carer's allowance, suggesting that, if, at the time of the Secretary of State's decision that she was not entitled to carer's allowance, there had merely been a suspension of payments of disability living allowance to the claimant, it might have been more appropriate merely to suspend the payment of carer's allowance until there had been a supersession decision in respect of the payability of the middle rate of the care component of disability living allowance. I indicated that I would give permission to appeal if an application were made within one month of my observations being issued to the present claimant's mother, but pointed out that it was arguable that the award of carer's allowance could have been superseded on the alternative

ground that she was no longer regularly and substantially caring for her son. Perhaps with that indication in mind, she did not apply for permission to appeal.

14. Following my case management directions, the Secretary of State made a submission to the effect that the First-tier Tribunal had erred in admitting the appeal brought on the claimant's behalf because it had not been brought by his appointee, but he also raised the question whether Medway Council should have been appointed to act and whether the claimant's mother was therefore still the appointee. No submission was received from Medway Council at that stage. The claimant's father supported the suggestion that Medway Council had not validly been appointed to act on the claimant's behalf, but not the suggestion that the claimant's mother was still the appointee, and requested further case-management directions, which I declined to give immediately. On 4 October 2017, I made some observations on the Secretary of State's submission and I directed Medway Council to provide certain information and I allowed it to make a fuller submission and each of the other parties to make a further submission in the light of it. I also directed that there be an oral hearing of both applications.

15. Medway Council responded by making a full submission, drafted by Mr Oliver Lewis of counsel. Mr Lewis submitted that the evidence that Medway Council had in fact been acting on behalf of the claimant was sufficient to show that it had been appointed under regulation 33 of the 1987 Regulations to act but that, in the light of *R(C) v First-tier Tribunal* [2016] EWHC 707 (Admin), the First-tier Tribunal could and should have appointed the claimant's father as the claimant's litigation friend and that the Upper Tribunal should do so. He said that Medway Council was not aware of any capacity assessment of the claimant and he referred to documents in its possession suggesting that he lacked capacity to manage his finances. Those documents have not been provided to the Upper Tribunal and I have not directed that they should be. He also stated that the claimant's stay in the care home was funded by Medway Council under section 117 of the Mental Health Act 1983 and he submitted that the First-tier Tribunal had reached the correct conclusion as to the payability of disability living allowance. Nonetheless, he submitted that there were serious questions about the fairness of the appointee system and its compatibility with the European Convention on Human Rights that merited consideration and he suggested that the Upper Tribunal should transfer the case to the High Court so that it could consider those issues. Copies of that submission were sent to the other parties on 9 November 2017 and, on 14 November 2017, the parties were sent notice that the hearing would take place on 16 January 2018.

16. The claimant's father first sought directions that the documents mentioned in the submission and other documents should be provided by Medway Council to the Upper Tribunal and the parties. He also made it clear, by way of notice of a proposed application for judicial review of the Upper Tribunal, that he did not agree with Medway Council's submission that he should be appointed as the claimant's litigation friend. I declined to make the directions sought, but I indicated that it might be helpful if Medway Council were to provide some of the documents requested and that I would deal at the hearing with the issue of the standing of the claimant and whether a litigation friend should be appointed. The claimant's father then applied for the postponement of the hearing, which I refused. He then sent a series of letters and emails, raising further procedural issues including a further request for the postponement of the hearing, threatening further judicial review proceedings, stating that he was terminating his appointment as the representative of the claimant (and also, in the judicial review proceedings before the Upper Tribunal, of the claimant's mother) and applying to intervene in the proceedings in his own right. The claimant's mother also sent an

email "for both me and my son", although she later clarified that she was not acting as his representative. She asserted that her son was "mentally capable" and would never accept a litigation friend. She also asked that the proceedings be stopped as she and her son were applying for legal aid.

17. On 1 December 2017, I refused to join the father as a further respondent in the case, on the ground that he did not have a sufficient independent interest in the proceedings and I again refused to postpone the hearing on the ground that I was not then persuaded that the Upper Tribunal could not fairly consider the case without the claimant and his mother having legal representation. I also directed that all currently outstanding procedural issues and any further procedural issues would be considered at the hearing and would not be determined in writing before then.

18. On 19 December 2017, the Upper Tribunal received a further submission from the Secretary of State, drafted by Ms Nicola Greaney of counsel, in which he modified his position. He now submitted that the First-tier Tribunal had erred in allowing the claimant to bring an appeal through an informal representative but should instead have appointed the claimant's father as the claimant's litigation friend. However, it was submitted that the Upper Tribunal could cure that defect by itself appointing the claimant's father as his litigation friend and that it should then refuse permission to appeal on the ground that the grounds of appeal were wholly without merit. To that extent, the Secretary of State's position was similar to that taken by Medway Council. However, he opposed the suggestion that the Upper Tribunal should transfer the case to the High Court.

19. On 20 December 2017, I gave the claimant and his mother (as a party in the judicial review proceedings) an opportunity to make written submissions and said that it was open to the claimant to provide written medical evidence as to his capacity. I also directed that all other issues would be considered at the hearing. The claimant's mother said that she had been advised not to attend the hearing but she argued that her appointment under regulation 33 had not been lawfully revoked and she asked to be allowed to intervene in the appeal. The claimant himself, in an email that, like his mother's, was plainly written by, or with the help of, his father, asked for my directions dated 20 December 2017 to be set aside and supported his mother's claim to be his appointee, rather than Medway Council, and her application to be joined as a party to the appeal. On 10 January 2018, I refused to set aside my directions dated 20 December 2017.

20. The hearing took place on 16 January 2018. The claimant, understandably, did not attend and neither, less understandably but not unexpectedly, did either of his parents. Ms Greaney appeared for the Secretary of State and Mr Lewis appeared for Medway Council. I am grateful to both of them for their oral submission and also their written submissions, which included a skeleton argument submitted by Mr Lewis at the hearing.

21. Counsel were agreed that it was unclear whether the claimant had the capacity to participate in tribunal proceedings. Ms Greaney submitted that, nonetheless, the application for permission to appeal had no merit and should be dismissed. However, Mr Lewis argued that it was necessary to determine whether the claimant has the capacity to conduct litigation and said that Medway Council was, exceptionally, prepared to pay for an assessment and for an independent mental capacity advocate to put the claimant's arguments to the Upper Tribunal, although it was not prepared to pay for legal representation on the ground that legal representation is not necessary before the Upper Tribunal. His argument was that the case

raised important issues other than those relating to the narrow issue of the claimant's entitlement to disability living allowance, and that, if he lacked capacity, it would be unfair to the claimant that those issues should be decided without a litigation friend being appointed to make representations on his behalf.

22. I do not accept Mr Lewis' submission, but it is necessary for me to consider some of the important issues to which he referred in order to explain why. However, before I do so, I must decide whether Medway Council should be replaced as the Second Respondent by the claimant's mother.

The Claimant's Mother's Application

23. When I first considered this case, I directed that Medway Council be added as the Second Respondent on the ground that the Secretary of State had said that it had been appointed to act on behalf of the claimant. The claimant's mother's claim that she is the appointee is effectively an application that she should be substituted for Medway Council as the Second Respondent in these proceedings. She did not appear at the hearing to argue her case orally but her written arguments are that she was lawfully appointed to act on her son's behalf in 1999, that the Secretary of State was not entitled to appoint Medway Council in her place when she had objected, that he did not give her written notice of having done so and that, in so far as Medway Council had been acting as though it was the appointee, it had been doing so unlawfully.

24. While I agree with the claimant's mother that there cannot properly be more than one appointee at a time acting in place of the claimant in respect of a single benefit, I do not accept that the Secretary of State was not entitled to appoint Medway Council in place of the claimant's mother, despite her objection, because, in the light of regulation 33(2)(b), regulation 33(2)(a) of the 1987 Regulations clearly provides for the revocation of an appointment otherwise than upon the resignation of the appointee, following which he can obviously appoint someone else. So, the question is whether he did in fact revoke the claimant's mother's appointment and appoint Medway Council in her place.

25. There is no evidence before me that the Secretary of State did write to the claimant's mother to inform her that he had revoked her appointment and there is no documentary record either of the appointment of Medway Council to act on behalf of the claimant or of the revocation of the appointment of the claimant's mother. Normally, an appointment would have been documented by an officer in the Department completing the relevant part of the form on which the application for appointment was made and the revocation of the appointment would be documented by completing a further part of the same form. Here, the relevant forms have been produced but, while the claimant's mother's appointment in 1999 was recorded on her application (doc 226), the boxes that should have been completed if her appointment was "cancelled" are blank, as is the part of Medway Council's application form for recording that the application had been accepted (doc 73). The internal documents not having been completed, I consider it probable that not only did the claimant's mother not receive a notice that her appointment had been revoked but also that such a notice was never sent.

26. However, there is no statutory requirement that an appointment, or the revocation of an appointment, be in writing and, while one would expect such acts to be recorded in writing as a matter of good practice, writing is not required for an appointment or revocation to be

valid. Moreover, it is quite clear on the evidence before me, not only that the Secretary of State was contemplating appointing Medway Council to act on behalf of the claimant in place of his mother, but also that he actually decided that it should act on the claimant's behalf because, as is not disputed, he started paying the claimant's disability living allowance into an account managed by Medway Council and stopped making such payments to the claimant's mother. Medway Council had clearly been given to understand that it was the appointee because, not only did it open the account for the claimant, but it also behaved as the appointee when notifying the Secretary of State of the claimant's changes of address and stays in hospital. Despite the lack of formal notification, the claimant's mother must have been aware that she was no longer being treated as the appointee because payment of the claimant's benefits to her had stopped. She appears, albeit no doubt reluctantly, to have accepted the situation. I note that, when the Secretary of State suggested in his first submission that, if Medway Council had not been validly appointed, the claimant's mother's appointment might still subsist, the claimant's father, who was then acting as the claimant's representative, dismissed the suggestion as "idiotic" (doc 233) and it is only very recently that the claimant's mother has adopted the suggestion that she remains the appointee.

27. The claimant's mother has also complained that Medway Council has not acted properly as an appointee and, in particular, has not accounted for the benefit it has received. Even if there were any merit in the complaint, it would not be relevant to the question of who was the appointee and, indeed, I do not understand the claimant's mother to suggest it is. While misconduct by an appointee might plainly lead to the Secretary of State revoking an appointment, it does not itself invalidate the appointment and so the appointment remains effective until it is either revoked by the Secretary of State or quashed by a court or tribunal with jurisdiction to do so. Similarly, even though there may have been procedural defects in the way that the Secretary of State revoked the claimant's mother's appointment, they are not such as to make the revocation void, even though they might have justified a competent court or tribunal in quashing the decision. For reasons that I shall explain below, the Upper Tribunal does not possess jurisdiction to quash any decision made under regulation 33 of the 1987 Regulations in this case and so it is unnecessary for me to investigate, or comment upon, the allegations of misconduct or procedural impropriety. Even more obviously, misconduct justifying the revocation of an appointment would not automatically revive a previous appointment that had already been revoked.

28. For all these reasons I am quite satisfied that the claimant's mother's appointment was in fact revoked and that Medway Council was in fact appointed in her place, despite the unsatisfactory lack of documentary record, and that Medway Council remains the appointee. I therefore reject the claimant's mother's application to be substituted for Medway Council as the Second Respondent. I also refuse to add her as a third respondent for the same reason that I refused to add the claimant's father as a party in his own right, which is that she has no independent interest in the substantive application concerning her son's entitlement to disability living allowance. Nor do I consider it appropriate formally to allow her to intervene without being made a party. She does not have the sort of interest that one might expect an intervener to have and, if a mother is to be allowed to participate in proceedings in which her son is the claimant, I consider that she should generally do so in the capacity of representative, appointee or litigation friend and so as a person with a duty to act on his behalf or in his interests. In any event, she refused to attend the hearing and had not appointed a representative to replace the claimant's father and so was in fact unable to act as an intervener by making representations on the issues in the case. (Since the hearing, she has again

appointed the claimant's father as her representative but it is too late for him to make any further representations on her behalf.)

Appeals where there are appointees – the general principles

29. There is very little, if any, difference between the parties on the right of a claimant to bring an appeal where there is an appointee and I can decide this issue in the claimant's favour without hearing further argument. Section 12(2) of the Social Security Act 1998 confers a right of appeal on "the claimant and such other person as may be prescribed" and regulation 25(a) of the 1999 Regulations prescribes any person appointed by the Secretary of State under regulation 33(1) of the 1987 Regulation to act on behalf of another. The use of the word "and" in section 12(2) means that, on a literal reading, the mere fact that there has been an appointment under regulation 33(1) does not preclude a claimant from bringing an appeal himself or herself.

30. Because a person is appointed under regulation 33(1) "to exercise, on behalf of the person who is unable to act, any right to which that person may be entitled", it is, at first sight, arguable that "and" should be read as "or" in this instance, since a person who is unable to act is presumably unable to bring an appeal.

31. However, lack of capacity to bring an appeal is not an insuperable problem because, where a person lacks capacity to bring or respond to an appeal, the First-tier Tribunal has the power to appoint a litigation friend and must exercise that power if it is necessary to do so to avoid a breach of the rules of natural justice or, which amounts to much the same thing, to avoid a breach of Article 6 of the European Convention on Human Rights. This is now clear from *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, in which Ryder LJ, with whom Underhill and Gross LJJ agreed, considered the position in the Immigration and Asylum Chamber of the First-tier Tribunal and said –

> "44. I have come to the conclusion that there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached. It must be remembered that this step will not be necessary in many cases because a child who is an asylum seeker in the UK will have a public authority who may exercise responsibility for him or her and who can give instructions and assistance in the provision of legal representation of the child."

Similarly, the power of the Secretary of State to appoint a person under regulation 33 who can conduct a social security case in place of the claimant means that it will rarely be necessary for the First-tier Tribunal to appoint a litigation friend in such a case. However, it can be done if it is necessary.

32. Since the basis of an appointment is the claimant's incapacity to act and an appointee stands in the shoes of the claimant (R(SB) 9/84), it seems to me that the Secretary of State and the First-tier Tribunal are entitled to presume that a claimant in respect of whom an appointment under regulation 33 has been made (and remains extant) is incapable of bringing an appeal and, notwithstanding the terms of section 12(2), is to be regarded as not having a

separate right of appeal for the purposes of regulation 28 of the 1999 Regulations (relating to the duty to provide notices of decisions to persons with a right of appeal) and of the definition of "respondent" in the First-tier Tribunal Rules (which requires that any person other than the appellant who had a right of appeal against the challenged decision is to be made a respondent to an appeal). That is current practice and in my view is justified because it can generally be presumed that an appointee will, like a litigation friend or a public authority, be a suitable person and act in the claimant's best interests.

It has the effect that, unless a claimant or somebody else wishing to act on the claimant's behalf raises the issue, it is, as counsel agreed, unnecessary for the First-tier Tribunal to consider the possibility of appointing a litigation friend for the claimant. Even then it may be unnecessary for the First-tier Tribunal to appoint a litigation friend to act for a claimant who lacks capacity, unless it is proposed to advance on behalf of the claimant a different argument from that advanced by the appointee or any other party.

33. However, these various presumptions may be challenged and it would be unfair not to allow such challenges to be mounted, at least if they would have a reasonable prospect of success. In particular, a person wishing to act on behalf of a claimant who lacks capacity may consider that there are grounds for an appeal that an appointee has declined to bring. It is common ground between counsel – and I do not think is disputed (as a general proposition) by or on behalf of the claimant – that in such a case the person wishing to act may submit an appeal and apply to be appointed as a litigation friend. Plainly, given time limits, it would be impractical to expect a person to apply to be appointed as a litigation friend before submitting the appeal, as was recognized in relation to social security claims in R(SB) 9/84. It is also common ground between counsel – and again I do not think is disputed (as a general proposition) by or on behalf of the claimant – that a litigation friend must be someone who can fairly and competently conduct proceedings on behalf of the claimant, has no interest adverse to that of the claimant and consents to being appointed as the claimant's litigation friend. That is a matter of common sense but, if necessary, reliance by way of analogy may be placed on CPR regulation 21.4(3)(a) and (b) and regulation17.1(1) of the Court of Protection Rules 2017 (SI 2017/1035). As to the approach that should be taken to the appointment of a relative of the claimant as a litigation friend, Mr Lewis referred in his skeleton argument to the helpful guidance given by Charles J in *Re NRA* [2015] EWCOP 59 at [158] to [175], although the likelihood of there being relevant family disputes or conflicts of interests is, I would suggest, much lower in social security cases than in cases before the Court of Protection concerned with the welfare of persons lacking capacity.

34. A claimant may also argue that he does in fact have litigation capacity and so should be allowed to bring or respond to an appeal without any litigation friend being appointed. Such an argument may imply an argument that the appointment should be revoked. However, subject to any *ultra vires* argument, there is no right of appeal against any decision under regulation 33 of the 1987 Regulations (see regulation 27 of, and paragraph 5(s) of Schedule 2 to, the 1999 Regulations, which provisions are made under either section 12(2)(a) of, or paragraph 9 of Schedule 2 to, the Social Security Act 1998 (or perhaps under both of those enabling powers)). Nonetheless, the First-tier Tribunal has the power to determine whether a claimant has litigation capacity, for the purpose of determining whether a litigation friend is necessary, even if it has no power to decide whether an appointment under regulation 33(1) should be made or revoked, although no doubt the Secretary of State would have regard to anything the First-tier Tribunal said about a claimant's capacity when making further decisions under regulation 33 of the 1987 Regulations. The consequence is that, if the First-tier Tribunal decides that a claimant has capacity to conduct proceedings and has validly

brought an appeal in his or her own name but the Secretary of State does not revoke the appointment, the appointee is a respondent to the claimant's appeal by virtue of having had a right of appeal under section 12(2) and it will be to the appointee that any benefit awarded to the claimant as a result of the appeal would be paid.

35. There is, as far as I am aware, no scheme for paying litigation friends as such – and there seems to me to be no reason why there should be in social security cases – but I presume that a litigation friend would be paid the same expenses under rule 21 of the First-tier Tribunal Rules or rule 20 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (the "Upper Tribunal Rules") as a claimant or unpaid representative or appointee. Legal aid is not a live issue in the overwhelming majority of social security cases before tribunals, where it is not expected that claimants will have legal representation and proceedings are conducted accordingly.

The need to consider a claimant's capacity to conduct litigation before tribunals

36. A potential difficulty arises in this case because it is unclear whether or not the claimant has capacity to conduct litigation before tribunals. There is a presumption of capacity, but there are reasons not to rely on the presumption in this case. It was clearly once thought by the Secretary of State that the claimant should have an appointee, but the grounds for that decision are unknown and, anyway, the claimant's mental health may have fluctuated. More importantly, there is what I have been told in Medway Council's written response to the appeal, although the documents referred to in the submission have not been supplied. There is also an element of inconsistency in the submissions made by the claimant's parents. In the original appeal to the First-tier Tribunal, the claimant's father said that the claimant acted under a disability, although it was also said that the claimant had appointed his father as his representative. I incline to the view that a person mentally incapable of conducting proceedings is also incapable of appointing a representative because he or she would be incapable of giving instructions to the representative even though he or she might be able to express views as to who should represent him or her and about the case generally. The claimant's mother asserts that the claimant is mentally capable but also asserts that she is his appointee, which tends to imply that he is not capable of acting. Finally, although the Upper Tribunal has been sending documents addressed to the claimant himself since his father resigned as his representative, none of the documents sent to the Upper Tribunal in his name shows any sign of having been written by himself rather than by, or with very considerable help from, his father. None of these matters is sufficient by itself to show that the claimant lacks litigation capacity but, taken together, they raise sufficient doubts about his capacity for it to be inappropriate to rely on the presumption without making further attempts to obtain proper evidence.

37. However, determining whether or not a person has capacity to conduct proceedings may be considerably more difficult than deciding the substantive issue of social security entitlement that is the subject of an appeal and I take the view that it is not always necessary to make a determination as to capacity. If, as might have been the position in this case if the claimant's father had not resigned as the claimant's representative, a relative of the claimant has apparently been appointed by the claimant as a representative and the tribunal would appoint that person as an litigation friend if the claimant lacked the capacity to conduct litigation (being satisfied among other things that there is no apparent conflict of interest), it is difficult to see why the tribunal should not just hear the relative on the basis that they are either a representative or litigation friend and it does not matter which.

38. It is true that a representative acts on the claimant's instructions whereas a litigation friend must merely take into account, and draw the tribunal's attention to, the claimant's wishes but must otherwise act in the claimant's best interests. However, in the majority of social security cases, it is very difficult to envisage a representative acting any differently from a litigation friend or to see why it matters in which of those capacities a person acts, although it may do so in a case where bringing an appeal carries a real risk of a tribunal making a decision less favourable to the claimant than the one being challenged. It needs to be borne in mind that there is no power to award costs in the Social Entitlement Chamber of the First-tier Tribunal or, on an appeal from a decision of that chamber, in the Upper Tribunal (see rule 10 of the First-tier Tribunal Rules and rule 10(1)(b) of the Upper Tribunal Rules) and it is extremely unlikely that lawyers will be instructed. Therefore, the types of issues that frequently concern courts tend not to arise in social security cases before tribunals. Moreover, for as long as there is an appointee, any benefit awarded as a result of the appeal will be paid to the appointee and so the claimant is protected in that way in any event. All these considerations mean that, in most cases where there is an appointee, it would simply be disproportionate to obtain the evidence necessary to make an assessment of capacity so as to be able to decide whether a person who has apparently been appointed as a representative should act as such or be appointed as a litigation friend.

39. In the present case, the proceedings carry no risk to the claimant and both the Secretary of State and Medway Council had submitted that, if the claimant lacked capacity and his father consented to the appointment, it would have been appropriate to appoint him as the claimant's litigation friend. Therefore, if the claimant's father had continued to assert, without providing any adequate evidence, that the claimant had capacity and that he was acting as the claimant's representative and would not consent to being a litigation friend solely because he did not accept that the claimant lacked capacity, I would not have considered it necessary to investigate the question of capacity any further and would have accepted that the claimant's interests were being adequately advanced and protected by the claimant's father and the appointee between them.

Fairness if the claimant lacks capacity and has no litigation friend

40. It follows from what I have said above that I am satisfied that, even if the claimant lacked capacity, the appeal before the Upper Tribunal was validly brought by the claimant's father on the claimant's behalf. However, the claimant's father has resigned as a representative and still refuses to be appointed as a litigation friend. The claimant has not appointed an alternative representative (or appeared at the hearing himself). No-one else has volunteered to be a litigation friend and the claimant's mother has made it clear that she would be unwilling to be appointed as one and she has not availed herself of the opportunity to attend the hearing to make representations or to be persuaded to change her mind.

41. If the claimant has capacity to conduct tribunal proceedings, there is no unfairness in my proceeding to determine this application for permission to appeal despite what was presumably a choice neither to appear at the hearing or be represented. I have decided the jurisdictional issue in the claimant's favour and am able to consider on the papers the arguments on the substantive issue of his entitlement to disability living allowance that were advanced by his father earlier in the proceedings.

42. If the claimant does not have capacity, Ms Greaney submits that, if I have jurisdiction to do so, I should still determine the application for permission to appeal and dismiss it because an appeal would not have a reasonable prospect of success. However, Mr Lewis argues strongly that, if the claimant lacks the capacity to conduct his case, it would be unfair to determine the application without a litigation friend being appointed, because other important issues of law have been raised. Therefore, he argues, it is not possible to avoid the issue of the claimant's capacity in this case.

43. In his skeleton argument, Mr Lewis has identified nine issues raised by this case other than the question of entitlement to disability living allowance. I have considered five of them in paragraphs 29 to 34 above and have decided the crucial issue of practical importance to the claimant – whether there being an appointee precluded him from bringing appeals to the First-tier Tribunal and the Upper Tribunal himself – in his favour. I have touched on two more of the nine points at paragraphs 36 to 39 above. The other two points, which are closely related to each other and a further point raised in Medway Council's written submission, are admitted by Mr Lewis to be entirely academic in this case. For reasons that I will give below, I am satisfied that those academic issues ought not to be determined.

44. In considering whether there is unfairness in proceeding without a litigation friend, the starting point must be that, as I have said above, it is generally to be presumed that a claimant who lacks capacity is adequately represented by an appointee and does not need a litigation friend unless the claimant, or a person wishing to act on the claimant's behalf, comes forward and wishes to advance an argument that the appointee is not advancing. Therefore, if a person has been acting on the claimant's behalf but no longer wishes to do so, it may be appropriate to fall back on the presumption and consider the claimant's interests adequately to be protected by the appointee together with the investigatory approach of the expert tribunal, which may enable it to determine an issue identified on behalf of the claimant without it being necessary for the claimant or a litigation friend to take any further action. However, this will depend on the circumstances. In particular, it will be relevant whether the tribunal considers that the appointee is failing to take points that ought to be taken on behalf of the claimant or that there ought to be an opportunity for further evidence to be advanced on behalf of the claimant.

45. It is also highly relevant what decisions the tribunal is minded to make. I find it difficult to imagine lack of a litigation friend making it unfair to decide a point entirely in favour of the claimant, even though deciding the same point against the claimant without a litigation friend having been appointed might be unfair. Nor, at least in this case, can I see any unfairness in me deciding, without a litigation friend having been appointed, issues that are neutral in their effect on the substantive application for permission to appeal, including deciding that certain issues do not need to be decided. As to the substantive application itself, it is for permission to appeal on a point of law in an area of the law in which the Upper Tribunal has considerable experience and frequently raises issues of law that have not been advanced by the parties. The grounds of appeal and other documents identify the arguments that the claimant's father wished to advance. Evidence is not required. The claimant's father is no longer prepared to act on behalf of the claimant. The appointee has instructed counsel and I do not consider that there is any point that could be taken in the claimant's interests that has not been taken. In all these circumstances, I am satisfied that, even if the claimant lacks capacity, I can fairly determine this application and the issues arising in relation to it without it being necessary to appoint a litigation friend to act on behalf of the claimant.

Academic points

46. As mentioned above, Mr Lewis identified in his skeleton argument nine important issues, other than points directly related to the payability of the claimant's disability living allowance, and I have decided, or at least alluded to, seven of them. However, I have not perhaps given as much guidance as Mr Lewis might have wished on the operation of the presumption of capacity in a case where an appointment under regulation 33(1) of the 1987 Regulations (or equivalent provisions) has been made, on the determination of capacity where there is a dispute or on the principles for deciding whether to appoint a person as a litigation friend.

47. The other two points identified by Mr Lewis in his skeleton argument raised questions about the compatibility of the scheme for appointing people to act on behalf of claimants with rights under the European Convention on Human Rights. Is the lack of a right of appeal against decisions made under regulation 33 compatible with Convention rights? Is the lack of opportunity to apply to a court to displace an appointee and appoint another person compatible with Convention rights?

48. Furthermore, in Medway Council's written submission, Mr Lewis argued that the human rights issues raised by the lack of a right of appeal are particularly acute because, in his submission, the system lacks an adequate review process. He pointed out that Article 12.4 of the United Nations Convention on the Rights of Person with Disabilities provides –

> "4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."

When ratifying the Convention in 2009, the United Kingdom Government entered a reservation with respect to Article 12.4 in the following terms –

> "The United Kingdom's arrangements, whereby the Secretary of State may appoint a person to exercise rights in relation to social security claims and payments on behalf of an individual who is for the time being unable to act, are not at present subject to the safeguard of regular review, as required by Article 12.4 of the Convention and the UK reserves the right to apply those arrangements. The UK is therefore working towards a proportionate system of review."

That reservation was withdrawn in 2011, following publication by the Secretary of State of up-dated guidance in the "*Agents, Appointees, Attorneys and Deputies Guide*". However, Mr Lewis submits that the guidance makes inadequate provision for reviews and is incompatible with the European Convention on Human Rights because it provides that appointments will generally be reviewed only once every eight years and there is no provision at all for reviews in cases like the present where there is a "corporate appointee" (see Appendix 19 of the *Guide*).

49. These points are all very interesting but, as Mr Lewis accepts, they are academic in this case in the sense that it is not necessary to consider them further, or at all, in order to determine the substantive application for permission to appeal. Nonetheless, he submits that the Upper Tribunal should determine the issues or transfer the proceedings to the High Court under rule 5(3)(k)(ii) of the Upper Tribunal Rules. He cites *R. v Secretary of State for the Home Department, ex parte Salem* [1999] UKHL 8; [1999] 1 AC 450 and *R (Zoolife International Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin), where it was accepted that, as a matter of discretion, a court may determine a point of public law that has become academic if there is a good reason for doing so. As to whether there is a "good reason" in this case, he cites *R v Horseferry Road Magistrates' Court, ex parte Bennett (No.2)* [1994] 1 All ER 289, where a Divisional Court, having made an unopposed order for the production by the Crown Prosecution Service of documents relevant to criminal proceedings that would otherwise have been in a class covered by public interest immunity, gave guidance as to the approach to be taken in the future where the Crown Prosecution Service wished voluntarily to disclose such documents to the defence. It gave the guidance "only because it is difficult to see how this question could ever fall for direct decision".

50. In my view, *ex parte Bennett* can be distinguished on two grounds and, far from there being a good reason for considering academic points in this case, there are good reasons for not doing so.

51. The first ground for distinguishing *ex parte Bennett* is that the guidance sought by the Crown Prosecution Service in that case was not a matter of contention between the parties before the Court, whereas here it is obvious that the Secretary of State would not accept some of Mr Lewis' arguments.

52. The other ground for distinguishing *ex parte Bennett* is that, while it was obviously difficult to see in what form of contested proceedings the Crown Prosecution Service could have obtained the guidance it sought in that case, a challenge to the subordinate legislation or guidance relating to appointees could plainly be brought by a person with a sufficient interest, by way of judicial review proceedings in the High Court against the Secretary of State. Indeed, it is possible that an *ultra vires* challenge to paragraph 5(s) of Schedule 2 to the 1999 Regulations, which excludes decisions made under regulation 33(1) of the 1987 Regulations from those that are subject to the right of appeal conferred by section 12 of the Social Security Act 1998, could be brought before the First-tier Tribunal (see *Foster v Chief Adjudication Officer* [1993] AC 754 (also reported as R(IS) 22/93)) – and from there to the Upper Tribunal – by submitting an appeal against such a decision to the First-tier Tribunal and opposing any application by the Secretary of State for it to be struck out for want of jurisdiction. (The *vires* issue does not fall for consideration in the present case, despite the claimant's, or his parents', unhappiness about the appointment of Medway Council, because the appeal to the First-tier Tribunal brought in 2016 cannot reasonably be construed as having included an appeal against a decision given under regulation 33 of the 1987 Regulations. The claimant's father may have expressed his unhappiness in the notice of appeal and his parents may have expressed it to Medway Council but they had not expressed it to the Secretary of State and so he had not made any decision under regulation 33 since 2009 with the result that an appeal brought in 2016 would have been irredeemably out of time.)

53. I accept that challenges by way of judicial review or a statutory appeal to determine the unresolved issues raised by Mr Lewis may be unlikely, but any unfairness in relation to appeals to the First-tier Tribunal against decisions in respect of entitlement to social security benefits is largely removed by my recognition that claimants may bring or participate in such appeals even if there has been an appointment under regulation 33(1) and any other alleged defects in the scheme for appointments seem too remote from such appeals to be any business of the Upper Tribunal.

54. Moreover, the fact that some of the academic issues raised by Mr Lewis are likely to be highly contentious provides a good reason for *not* determining them. It is one thing to give guidance where the Secretary of State, who has to operate it, either asks for the guidance or at least is prepared for the Upper Tribunal to give it or when the court or tribunal does not intend the guidance to be binding; it is another to do so when the guidance involves decisions on points of law that might be challenged on appeal before a Court less keen on determining an academic point but feeling driven to do so (see *Office of Communications v Floe Telecom Ltd* [2009] EWCA Civ 47). In so far as some of the guidance sought might not be contentious, it would still be disproportionate to spend judicial time, and the parties' time, on the issues when they are unlikely often to arise before tribunals. Further, it seems undesirable to involve the claimant and his parents in complicated legal arguments that are not really necessary for the purpose of deciding the substantive question of the payability of disability living allowance, particularly as it seems unlikely that they would welcome the capacity assessment of the claimant or the possible imposition of a litigation friend that Mr Lewis submits would be necessary. For all these reasons, I do not consider that I should give permission to appeal or otherwise adjourn in order to obtain further argument on the issues raised by Mr Lewis.

55. Even if I did consider that academic issues should be determined in this case, I very much doubt that it would be proper for me to transfer this case to the High Court. Rule 5(3)(k) of the Upper Tribunal Rules permits the Upper Tribunal to "transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings", but the High Court does not have jurisdiction to determine statutory appeals from the First-tier Tribunal. Mr Lewis submits that transfer is appropriate because human rights issued are raised, but that seems irrelevant. It is true that the Upper Tribunal has no power to make a declaration of incompatibility under section 4 of the Human Rights Act 1998, but that does not give the High Court jurisdiction to determine a statutory appeal under the Social Security Act 1998 or the Tribunals, Courts and Enforcement Act 2007, quite apart from the fact that it is not obvious that any of Mr Lewis' issues calls into question the compatibility of primary legislation with Convention rights. The true reason why High Court proceedings would be appropriate is that the contentious issues ought to be determined in judicial review proceedings against the Secretary of State. If either this case or the application for permission to apply for judicial review currently before the Upper Tribunal were to be reconstituted as such judicial review proceedings, the case would have to be transferred to the High Court under section 18(3) of the Tribunals, Courts or Enforcement Act 2007 (because it would not be, or would have ceased to be, within a class specified for the purpose of section 18(6)). However, if such a major reconstitution of the proceedings by the Upper Tribunal were permissible at all – which I doubt because it would go further than mere amendment and it would generally be simpler and more appropriate for fresh proceedings to be brought in the High Court – it would be inappropriate without the consent of the claimant in whose name the proceedings were brought, and that would bring one back to the question of his capacity.

(The judge then considered the application for permission to appeal).

56. For all these reasons, I consider that the proposed appeal would have no reasonable prospect of success and I therefore refuse permission to appeal.