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 Newport Isle of Wight First-tier Tribunal dated 7 November 2016 under file reference SC198/16/00177 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> ***The appeal is allowed.***
>
> ***The Secretary of State's decision of 24 June 2016 on the Appellant's entitlement to ESA is set aside.***
>
> ***The Appellant scores 15 points on the work capability test, namely 6 points for ESA descriptor 15c (getting about) and 9 points for ESA descriptor 17c (appropriateness of behaviour with others). The Appellant accordingly scores 15 points overall. On that basis at the material time he had limited capability for work and qualified for ESA as from 24 June 2016.***

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

REASONS FOR DECISION

The Upper Tribunal's decision in summary

1. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal ("the Tribunal"), dated 7 November 2016 involves an error of law and is set aside. The Tribunal's decision is therefore of no effect.

2. The usual outcome for successful appeals before the Upper Tribunal is that the claimant's original appeal against the decision by the Department for Work and Pensions (DWP) needs to be re-heard by a new First-tier Tribunal. However, a tribunal re-hearing is not necessary in the particular circumstances of this case. I therefore both (a) allow the Appellant's appeal to the Upper Tribunal; and also (b) re-make the decision that the First-tier Tribunal should have made and in the terms as set out above. My reasons follow.

A brief summary of the background to this appeal to the Upper Tribunal

3. On 24 June 2016 the Secretary of State's decision-maker ruled that the Appellant no longer qualified for employment and support allowance (ESA), awarding him 0 points on both the various physical and mental descriptors (p.133). That decision followed a report of an assessment on 27 May 2016 by a doctor on behalf of the DWP (p.68).

4. Coincidentally on 10 May 2016 the Appellant had an assessment for Personal Independence Payment (PIP). The assessor in that claim considered that the Appellant satisfied the descriptors for 7c (communicating verbally), 8c (reading and

understanding signs etc), 9b (engaging with others), 10b (making budgeting decisions) and 11d (planning and following journeys). As a result the Appellant was awarded the standard rate of both the daily living and the mobility components of PIP. I recognise, of course, that there are a number of important differences between the ESA and PIP descriptors. Just because a person qualifies for one benefit does not mean they will also qualify for the other.

5. On 12 July 2016 a decision-maker refused the Appellant's mandatory reconsideration request on his ESA claim.

6. The Appellant then appealed against the ESA decision and provided further evidence. In preparing its response, the DWP's position shifted somewhat but not enough so as to allow the appeal. The submission writer expressed the view on further reflection that the Appellant satisfied descriptor 17c (appropriateness of behaviour with other people). This scored 9 points, still 6 points short of the 15 points needed for the ESA appeal to succeed.

7. On 7 November 2016 the FTT dismissed the Appellant's appeal. The FTT confirmed the score of nil on nearly all of the various descriptors needed to qualify for ESA, with the single exception of agreeing with the 9 points now awarded for appropriateness of behaviour with other people. The Appellant then appealed to the Upper Tribunal,

The application for permission to appeal to the Upper Tribunal

8. I held an oral hearing of the application for permission to appeal at the Bournemouth Combined Court venue on 31 May 2017. I subsequently gave the Appellant permission to appeal in the following terms, having noted that the Appellant had two main arguments:

> *"The Appellant's first argument: the report by Dr Alam*
> 4. Dr Alam is an expert psychologist. She prepared a detailed report in 2011, paid for by legal aid. The report was prepared for the purpose of family court proceedings over the Appellant's contact with his daughter. There is no suggestion his health or other medical circumstances are different today compared with the position in 2011.
>
> 5. Ms Williams, who was assisting the Appellant at the First-tier Tribunal, sent in extracts from Dr Alam's full report – see appeal file at pp.35-44 (and see Ms Williams's letter at pp.27-28). These pages had been 'redacted' so that the name of the Appellant's ex-partner had been removed. These gaps do not affect our understanding of those parts of Dr Alam's report. But it was not the full report.
>
> 6. The Appellant explained to me he had eventually been given a diagnosis of dyslexia. Dr Alam's report makes it clear he has a number of specific learning difficulties.
>
> 7. The full report was not before the First-tier Tribunal. Ms Williams is not legally qualified and so may not have realised how that might help him. The Appellant's solicitors have now helpfully provided a full copy (pp.345-384). I note the solicitors are not acting for the Appellant in this case. I accept his explanation of how hard it is to get good legal advice about benefits issues, especially on the Isle of Wight.

8. The First-tier Tribunal mention Dr Alam's report at paragraph 6(e) of the statement of reasons on p.283. That mention was under the heading "learning how to do tasks". There is a short reference also at paragraph 6(j) on p.285.

9. The Appellant's argument was basically that the Tribunal had not considered Dr Alam's report, or at least not considered it adequately.

10. I think this ground of appeal is arguable. There is also an argument that the Tribunal should have considered whether to adjourn to get a copy of the full report by Dr Alam. I bear in mind that Ms Williams was not a legally qualified representative, even if she wrote a number of detailed and clear letters in support of the Appellant. It may be an inquisitorial tribunal should have asked more questions about the report.

The Appellant's second argument: the report of the PIP assessment

11. The Tribunal had a report from both the ESA assessment and the PIP assessment. The Appellant told me there was no real change in his health between the dates of the two assessments.

12. The Appellant's second argument was that the Tribunal did not properly consider the report of the PIP assessment.

13. The Tribunal referred to the PIP assessment briefly at paragraph 4(c) on p.280. I may be mistaken, but I did not see another reference in the statement of reasons to the PIP report.

14. I note the ESA decision under appeal was taken in June 2016. The PIP report is from May 2016. So it is from around the same time.

15. I recognise that the tests for getting ESA and PIP are very different. However, it seems to me at least arguable that the Tribunal should have considered the report of the PIP assessment more fully. I say that in the light of (i) the PIP assessor's observations at p.173 and (ii) the assessor's findings at pp.182, 183 and 187.

16. I note some parts of the PIP report were relied upon by Ms Williams in her letters of support – see e.g. pp.220-221). So, for example, the PIP report found the Appellant needed "communication support to be able to express or understand complex verbal information" (p.182; and see p.183). That might be relevant to ESA descriptor 6c ("making self understood"). In the same way, the PIP finding about mobility (p.187) was arguably relevant to ESA descriptor 15c.

17. So I think it is arguable that the Tribunal did not properly consider the PIP assessment.

Other matters

18. The Appellant raised a number of other matters, such as the difficulty in getting good legal advice. I understood what he was saying. However, I am not sure those arguments can be used to argue that the Tribunal went wrong in law in some way."

The Secretary of State's response to the appeal to the Upper Tribunal

9. Mr Mick Hampton then provided a response to the appeal on behalf of the Secretary of State. He did not initially support the appeal, or rather at least not on the basis of the two points identified above.

10. As to the first, he argued that the Tribunal was entitled to rely on the representative's assurance that she had provided the relevant parts of the 2011 report. Moreover, that report was not primarily concerned with the effect of the Appellant's various conditions and was now somewhat dated.

11. As to the second point, Mr Hampton contended that the Appellant's dyslexia was not a physical impairment that could be relevant to ESA physical descriptors in relation to e.g. activities 6 and 7. I am inclined to agree with Mr Hampton on both those matters.

12. However, Mr Hampton identified a further point which he considered was a ground for supporting the Appellant's appeal. In particular, Mr Hampton argued that the Tribunal was wrong to have regard to the use of aids in relation to the ESA activity of getting about (see p.389 para 9) – for that reason alone, he argued the Tribunal went wrong in law and so its decision should be set aside.

13. In the light of the Secretary of State's response, I then issued further Observations on the appeal and directed a fresh round of submissions. I did so as follows, referring to Mr Hampton's new point as Ground (3):

> *"Ground (3)*
> 6. Mr Hampton's argument here is that regulation 19(4) only allows aids to be taken into account when assessing the ability to carry out physical activities under Schedule 2 Part 1. So, he says, it is arguable the Tribunal went wrong in law by taking into account the Appellant's use of a phone app when getting about (activity 15).
>
> 7. I ask the question – is that right, as a matter of law?
>
> 8. Plainly regulation 19(4) says that when considering <u>physical</u> activities one must take into account a claimant's prosthesis (e.g. artificial limb) or any "aid or appliance" they use or could reasonably be worn or used. So, typically, a person's sight is assessed with them wearing glasses. A person's walking might be judged when using a stick (if that is reasonable etc). But does regulation 19 actually say that in assessing a person's ability to carry out <u>mental</u> activities you must exclude aids and appliances? Surely, it is just silent on the issue?
>
> 9. In addition, there is a further point. "Aid or appliance" is not defined under the ESA regulations. For the "getting about" activity, the lowest scoring descriptor is "unable to get to a specified place with which the claimant is unfamiliar *without being accompanied by another person*". In terms of assistance, is not the italicised phrase the crucial one? Surely the descriptor assumes the claimant may use other types of aid? And is not a map just as much an aid as a mobile phone app? A claimant with quite serious mental health problems (depending on the nature of those problems) may well be able to get to an unfamiliar place by using a map and without any third party help. If s/he is denied a map, s/he may be unable to get to the unfamiliar place (as would I in the same situation). If so, does s/he really qualify for 6 points, as Mr Hampton's argument seems to imply?
>
> 10. Likewise, activity 11 in Part 2 is concerned with learning tasks. Plenty of electrical appliances come with "how to operate" information booklets. If a person can learn how to use a washing machine by reading such an information booklet, are they to be assessed as if they never read such a booklet?"

14. Regulation 19(4) of the Employment Support Allowance Regulations 2008 (SI 2008/794), as substituted by regulation 3(2)(a) of the Employment and Support Allowance (Amendment) Regulations 2012 (SI 2012/3096) with effect from 28 January 2013, is in the following terms:

> "(4) In assessing the extent of a claimant's capability to perform any activity listed in Part 1 of Schedule 2, the claimant is to be assessed as if—
>
> (a) fitted with or wearing any prosthesis with which the claimant is normally fitted or normally wears; or, as the case may be,
>
> (b) wearing or using any aid or appliance which is normally, or could reasonably be expected to be, worn or used."

15. The reason for the redrafting of regulation 19(4) is not made explicit by the accompanying Explanatory Memorandum. However, it may have been undertaken in response to comments by Upper Tribunal Judge Levenson in *RP v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 449 (AAC).

16. In a further submission, and notwithstanding that invitation to reconsider the point, Mr Hampton stood by his earlier response on behalf of the Secretary of State. He argued that regulation 19(4) expressly singles out aids and appliances in the context of the list of physical activities: "in assessing the extent of a claimant's capability to perform any activity listed in Part 1 of Schedule 2" (emphasis added). If the intention had also been that aids and appliances were a consideration in relation to mental health activities, then the opening phrase would have read: In assessing the extent of a claimant's capability to perform any activity listed in Schedule 2" (emphasis added).

17. Mr Hampton also addresses the queries I raised in paragraphs 9 and 10 of the further Observations (see paragraph 13 above). He argues that using a map is not a critical consideration with regard to activity 15, where the focus is more on the need to be accompanied (for descriptors 15b and 15c). An ability to use a navigational aid does not negate a need to be accompanied. Likewise the focus of activity 11 (learning tasks) is on the ability to learn, which may be by any means that suits the individual.

18. The Appellant is content for me to decide the matter. He has sent in further correspondence about his difficulties with the DWP. He has also provided letters showing that a training charity for which he was working recently decided not to confirm his appointment after difficulties with other team members arose in the course of his probationary period.

The Upper Tribunal's analysis

19. The Tribunal concluded that no points were scored under activity 15 (getting about). There appears to be no dispute but that he was able to leave home and travel to familiar places without the support of another person. So the question was then whether he met the terms of descriptor 15c, namely "is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person". The Tribunal concluded that test was not met, finding that "He may need a navigation aid or software to navigate, but he does not need to be accompanied".

20. Mr Hampton, on the Secretary of State's reading of regulation 19(4), argues that this involves a misapplication of the law. The Tribunal should not have considered the Appellant's ability to navigate by a mobile phone app, as regulation 19(4) limits consideration of aids and appliances to the physical health descriptors in Part 1 of Schedule 2. I accept the Secretary of State's concession in this regard. This may

have been a material error of law. This is because the Tribunal failed to consider what would happen if the Appellant had no such access to a mobile phone app. He might then need someone to accompany him, given his difficulties in following street signs.

21. I should say that I have not heard full argument on the proper construction of regulation 19(4). That said, I can see the force in Mr Hampton's point that if it was intended that regulation 19(4) should apply to the mental health descriptors then the words "Part 1 of" would have been omitted. In addition, given the way that the mental health descriptors are formulated, it may be difficult to see quite how assistance with aids or appliances might be relevant.

22. However, in that context I certainly do accept Mr Hampton's argument with regard to activity 11 (learning tasks). It is simply not helpful to regard e.g. a manual for a washing machine as an "aid or appliance". Either (see descriptor 11c) a person cannot learn "anything beyond a moderately complex task, such as the steps involved in operating a washing machine to clean clothes" or they can. The method by which the person learns the task in question is irrelevant. They may be able to do so by reading the information booklet. They may be able to do so by having the necessary steps being demonstrated to them. The route is irrelevant. As Mr Hampton neatly puts it, "Reading a manual is just one way of learning to use something, show and tell is another".

Disposing of the appeal

23. The parties are therefore agreed the Tribunal went wrong in law and so I allow the appeal and set aside the Tribunal's decision.

24. The question then is what to do with the substantive appeal. Mr Hampton suggests I send the case back for a fresh hearing before a new Tribunal. The Appellant proposes that I decide the appeal myself.

25. Given all the circumstances, I take the view it is right for me to re-make this Tribunal's decision rather than send it back for a new hearing before a fresh Tribunal. There is sufficient evidence on file and the matter is getting stale. A remittal to a new Tribunal will add unnecessarily to delay in resolving this appeal. I therefore propose to re-make the Tribunal's decision under appeal.

26. I conclude that descriptor 15c ("is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person") was met at the relevant time. I reach that conclusion in part in the light of the Secretary of State's concession noted above. But I also do so in the light of the findings in the PIP medical assessment, which was broadly contemporaneous. The PIP assessor found that the Appellant could not read timetables and other public transport directions and struggled with cognitive issues. She expressly concluded that the Appellant "cannot follow the route of an unfamiliar journey without another person" and assessed him as meeting the criteria for PIP descriptor 11d. Looking at the evidence in the round, and adopting the required broad brush approach, I am satisfied that descriptor 15c is made out.

27. ESA descriptor 15c scores 6 points. There is no dispute over the Tribunal's decision to award 9 points for ESA descriptor 17c. The Appellant accordingly scores 15 points overall. On that basis at the material time he had limited capability for work and qualified for ESA.

Conclusion

28. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). There is no need for the case to be remitted for re-hearing by a new tribunal. Instead, I re-make the decision under appeal (section 12(2)(b)(ii)). My decision is as set out above.

29. For the avoidance of any doubt, I should make it clear (especially to the Appellant) that my decision turns on the particular circumstances as at the date of the original decision. It is not a binding precedent *on the facts* for future decisions or subsequent appeals. That is because the facts may change. So this decision does not mean that any subsequent appeals relating to eligibility for ESA will necessarily be decided in the same way. It will all depend on the facts and circumstances as they are found to apply in any later case.

Signed on the original
on 11 January 2018

Nicholas Wikeley
Judge of the Upper Tribunal