Appeal No. CPIP/1271/2018

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal succeeds.

The making of the decision of the First-tier Tribunal given at Stoke-on-Trent on 11 September 2017 under reference SC049/17/00736 involved the making of a material error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

I draw the claimant's attention that those directions are addressed to him as well as to the new tribunal and that direction 7 below includes a time limit.

DIRECTIONS

To the First-tier Tribunal

1. The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge, medical member, or disability-qualified member who made the decision I have set aside.

2. I recommend that the new tribunal should be presided over by a salaried judge.

3. The new tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

4. Before the appeal is reheard, the new tribunal must consider in accordance with paragraph 6 of the Practice Direction: *First Tier and Upper Tribunal – Child,*

Vulnerable Adult and Sensitive Witnesses how to facilitate the giving of any evidence by the claimant so as to give effect to the overriding objective and, in particular to the obligation to ensure, so far as practicable, that the parties are able to participate fully in the proceedings. Specifically, but without limitation, it must consider whether it is appropriate to give any directions of the type set out in paragraph 7 of that Practice Direction.

5. I recommend that, if practicable, an official recording should be made of the rehearing of this appeal

6. To the claimant

7. If you, or your representative on your behalf:

   (a) have any further written evidence that you wish the new tribunal to consider (and which casts light on your state of health on or before 10 November 2016); or

   (b) believe that special arrangements should be put in place to enable you to participate fully in the proceedings—including, but not limited to, the type of arrangement set out in paragraph 7 of the Practice Direction,

   you must write to the First-tier Tribunal at the Birmingham Appeals Service Centre, quoting reference SC049/17/00736, enclosing copies of any additional evidence, specifying the type of special arrangements that you consider desirable, and asking for the necessary directions to be made.

8. That letter must be *received* by the First-tier Tribunal no later than **one month** from the date on which this decision is *sent* to you. A judge of the First-tier Tribunal will then decide whether to make the Directions you have requested.

9. You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 11 September 2017 made a legal mistake, not because it has been accepted that you are entitled to personal independence payment. Whether or not you are entitled will now be decided by the new tribunal.

10. You are reminded that the new tribunal must consider whether the Secretary of State's decision was correct at the time it was made. That means:

    (a) it cannot take into account changes in your circumstances that occurred after 10 November 2016; and

    (b) it can only consider evidence from after that date if it casts light on how you were on or before 10 November 2016.

REASONS FOR DECISION

Summary

1. The claimant in this appeal is a “vulnerable adult”.

2. In those circumstances, the Practice Direction, *First-tier and Upper Tribunal – Child, Vulnerable Adult and Sensitive Witnesses* issued by the then Senior President of Tribunals 30 October 2008 ("the Practice Direction") required the First-tier Tribunal to “consider how to facilitate the giving of any evidence by” the claimant.

3. Such consideration must be undertaken consciously. It is good practice for the Tribunal to note in the record of proceedings that it has occurred, But, at the very least, any written statement of reasons must refer to the fact that the Tribunal considered how to facilitate the giving of evidence by the claimant, explain what the Tribunal decided and give a brief explanation for that decision.

4. In this case, I have set the First-tier Tribunal’s decision aside because there is no indication that it considered the issue at all.

5. Unfortunately, the definition of “vulnerable adult” raises difficult legal issues. Most of these Reasons consists of a discussion of those issues.

6. In that discussion, I reject an interpretation that would have the effect that no-one is a vulnerable adult.

7. However, the only other possible interpretation has the consequence that almost every adult who appeals to the Social Entitlement Chamber of the First-tier Tribunal will fall within the definition. The final part of the decision therefore aims to give practical guidance as to when omitting to follow the Practice Direction is likely to amount to a *material* error of law.

Procedural history

8. The claimant is now 29 years old. His treating doctors have diagnosed him as having an Autistic Spectrum Condition together with depression, anxiety and agoraphobia. He has a history of substance abuse, but was not using during the period with which these proceedings are concerned.

9. He claimed personal independence payment ("PIP") on 14 September 2016 and, on 10 November 2016, the Secretary of State decided that he was not entitled to that benefit.

10. That decision was made on the evidence of a health care professional (a nurse working for Capita) on a “paper-based assessment”, *i.e.*, without her seeing the claimant face to face.

11. On 8 March 2017, as part of what is known as "mandatory reconsideration", the Secretary of State refused to revise the decision made on 10 November 2016.

12. The claimant then appealed to the First-tier Tribunal and, on 11 September 2017, the Tribunal confirmed the Secretary of State's decision.

13. The claimant now appeals to the Upper Tribunal with my permission. The Secretary of State supports the appeal.

The grounds of appeal

14. The Tribunal's decision was made following a hearing. Although it is also submitted that the Tribunal's reasons and findings of fact are inadequate in a number of respects, the principal ground of appeal is that the hearing was conducted in a manner that was unfair to the claimant and indicated bias against him.

15. Specifically, the claimant's representative submits:

> "2) The hearing was conducted in a confrontational manner, contrary to the inquisitorial, impartial, function of the First-tier Tribunal … :
>
> 3) The medically qualified member of the panel:
>
> a) Asked the Appellant, in a confrontational tone, at least five different times, directly, why he had not asked his GP for more support either with medication or talking therapies.
>
> b) Interrupted other members of the panel, causing an effective 'crossfire' of questions.
>
> c) Used words, in a confrontational tone, such as, but not limited to:
>
> i) 'I must put it to you', and
>
> ii) 'I can only suggest'
>
> d) Made statements as if they were facts, rather than ask questions; such as, but not limited to:
>
> i) 'If your Doctor knew he would give you more medication' or words to that effect, and
>
> ii) 'There is medication available if you had asked for it', or words to that effect.
>
> 4) The Disability qualified member, acted as the other part of the crossfire questions.

5) Further, the Disability member, asked additional questions of fact after the Representative had made final submissions.

6) In addition, the Disability member argued with the Representative, when he was making submissions, such that the Representative submitted that he was not there to get into an argument about his submissions, merely that he asked the Tribunal to consider those submissions in their deliberations."

16. The record of proceedings includes a note that the representative protested at the end of the hearing that the "submission" (an obvious clerical error for "the hearing") was a cross-examination and that that circumstance might become a point of appeal.

Discussion

17. If the grounds of appeal that I have quoted above are correct, then the way in which the hearing was conducted was unacceptable.

18. Under rule 2(1) and (3) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules") the Tribunal is obliged to exercise its power to regulate its own procedure (see rule 5(1)) so as to give effect to the overriding objective of dealing with the case fairly and justly. Under rule 2(2)(c), that includes "ensuring, so far as practical, that the parties are able to participate fully in the proceedings". The Tribunal is entitled to test the evidence of any witness who appears before it, and in particular may often have to ask the claimant difficult and searching questions. But there is no need for such questions to be asked in a confrontational manner, and doing so tends to undermine the overriding objective by inhibiting the claimant's full participation in the proceedings rather than enabling it.

19. Equally, if the quoted grounds of appeal are incorrect, it is unacceptable that the members of the Tribunal should be wrongly accused of improper behaviour.

20. The procedures currently available to the Upper Tribunal to resolve this sort of dispute often lead to a state of affairs in which the only course open is to apply the burden of proof. In practice, that often means that the claimant will lose because he has not established on a balance of probabilities that unfairness has occurred.

21. That is not satisfactory for either the claimant or the tribunal members. If the claimant has had an unfair hearing, there should be a mechanism that allows him to establish that. And if the tribunal members have behaved correctly, there should be a positive finding to that effect, rather than a grudging decision that no-one has managed to prove otherwise.

22. Those problems would not arise if, as is the case for virtually all other judicial proceedings, hearings before the Social Entitlement Chamber were routinely recorded.

23. In this appeal, however, I do not have to decide whether the procedure followed during the hearing was fair. That is because, given the medical evidence, the Tribunal made a more fundamental error of law before the hearing had even begun.

The Practice Direction

24. The Practice Direction is in the following terms:

"**PRACTICE DIRECTION**
FIRST TIER AND UPPER TRIBUNAL
CHILD, VULNERABLE ADULT AND SENSITIVE WITNESSES

1. In this Practice Direction:

   a. 'child' means a person who has not attained the age of 18;

   b. 'vulnerable adult' has the same meaning as in the Safeguarding Vulnerable Groups Act 2006;

   c. 'sensitive witness' means an adult witness where the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with giving evidence in the case.

CIRCUMSTANCES UNDER WHICH A CHILD, VULNERABLE ADULT OR SENSITIVE WITNESS MAY GIVE EVIDENCE

2. A child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the Tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so.

3. In determining whether it is necessary for a child, vulnerable adult or sensitive witness to give evidence to enable the fair hearing of a case the Tribunal should have regard to all the available evidence and any representations made by the parties.

4. In determining whether the welfare of the child, vulnerable adult or sensitive witness would be prejudiced it may be appropriate for the Tribunal to invite submissions from interested persons, such as a child's parents.

5. The Tribunal may decline to issue a witness summons under the Tribunal Procedure Rules or to permit a child, vulnerable adult or sensitive witness to give evidence where it is satisfied that the evidence is not necessary to enable the fair hearing of the case and must decline to do so where the witness's welfare would be prejudiced by them giving evidence.

MANNER IN WHICH EVIDENCE IS GIVEN

> 6. The Tribunal must consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness.
>
> 7. It may be appropriate for the Tribunal to direct that the evidence should be given by telephone, video link or other means directed by the Tribunal, or to direct that a person be appointed for the purpose of the hearing who has the appropriate skills or experience in facilitating the giving of evidence by a child, vulnerable adult or sensitive witness.
>
> 8. This Practice Direction is made by the Senior President of Tribunals with the agreement of the Lord Chancellor. It is made in the exercise of powers conferred by the Tribunals, Courts and Enforcement Act 2007.
>
> **LORD JUSTICE CARNWATH**
> **SENIOR PRESIDENT OF TRIBUNALS**
> **30 October 2008"**

For convenience, this decision will refer to any directions given, or needed, to facilitate the giving of evidence by a vulnerable adult as "special arrangements". That phrase is intended to include directions of the type contemplated by paragraph 7 of the Practice Direction and also any other type of direction that—as the context requires—the Tribunal considers appropriate, or for which a party applies, to facilitate the giving of evidence.

25. The Senior President gave the Practice Direction in the exercise of powers conferred by section 23 of the Tribunals, Courts and Enforcement Act 2007. By section 23(4), the Senior President cannot exercise those powers without the approval of the Lord Chancellor.

26. One consequence of the fact that the Practice Direction is made under section 23 is that—unsurprisingly—it falls within the definition of "practice direction" in rule 1(3) of the SEC Rules and of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules").

27. That, in turn, means that rule 2(3)(b) of the SEC Rules required the First-tier Tribunal—and rule 2(3)(b) of the UT Rules requires me—to interpret the Practice Direction so as to give effect to the overriding objective.

28. In *AM (Afghanistan) v Secretary of State for the Home Department and Lord Chancellor* [2017] EWCA Civ 1123 the Court of Appeal held that the directions in the Practice Direction "are to be followed" and that "[f]ailure to follow them will most likely be an error of law": see Sir Ernest Ryder SPT at [30] and Gross and Underhill LJJ at [47] and [50].

29. In *JP v Secretary of State for Work and Pensions* (DLA) [2014] UKUT 275, [2015] AACR 2, Upper Tribunal Judge Jacobs held that developments in the law about children giving evidence—notably the decisions of the Court of Appeal in *Mabon v Mabon* [2005] EWCA Civ 634 and of the Supreme Court in *Re W (children) (family proceedings: evidence)* [2010] UKSC 12—required what is described in the

headnote as "careful application" of the Practice Direction. As he explained in paragraph 18:

> "18. Likewise, the application of the Practice Direction has to take account of the developments in the family cases. In so far as it deals with requiring a child to give evidence, it does not require adjustment. My concern is with allowing a child to give evidence, which is dealt with in paragraph 5. In so far as that paragraph provides that a tribunal *may* decline to hear evidence from a child when it is not necessary for a fair hearing, it is merely permissive. In deciding what a fair hearing requires, the tribunal will take account of the wishes of the child, as in the family cases. In so far as that paragraph provides that a tribunal *must* decline to hear evidence from a child when it would prejudice the child's welfare, it could conflict with the family cases. It is, though, possible to reconcile the two by taking account of the child's age, maturity and wishes in assessing the impact that giving evidence would have, as indicated in *Re W* at [26].

30. I agree with what Judge Jacobs said in *JP*, which, in any event, has the additional authority of a reported decision. But nothing in that decision has any bearing on the parts of the Practice Direction that are relevant in this case. Those are paragraph 6, which, on the facts of this case, required the Tribunal to

> "consider how to facilitate the giving of any evidence by a … vulnerable adult"

and paragraph 7, which gives examples of the types of direction that might be given in order to do so.

"Vulnerable adult"

31. By paragraph 1b of the Practice Direction ("Paragraph 1b") the phrase "vulnerable adult" has the same meaning as in the Safeguarding Vulnerable Groups Act 2006 ("SVGA").

32. When the Practice Direction was made, that phrase was defined for the purposes of SVGA by section 59(1) of that Act as follows:

> "**Vulnerable adults**
>
> **59.**—(1) A person is a vulnerable adult if he has attained the age of 18 and—
>
> (a) he is in residential accommodation,
>
> (b) he is in sheltered housing,
>
> (c) he receives domiciliary care,
>
> (d) he receives any form of health care,
>
> (e) he is detained in lawful custody,

> (f) he is by virtue of an order of a court under supervision by a person exercising functions for the purposes of Part 1 of the Criminal Justice and Court Services Act 2000 (c. 43),
>
> (fa) he is by virtue of an order of a court under supervision by a person acting for the purposes mentioned in section 1(1) of the Offender Management Act 2007 (c. 21),
>
> (g) he receives a welfare service of a prescribed description,
>
> (h) he receives any service or participates in any activity provided specifically for persons who fall within subsection (9),
>
> (i) payments are made to him (or to another on his behalf) in pursuance of arrangements under section 57 of the Health and Social Care Act 2001, or
>
> (j) he requires assistance in the conduct of his own affairs."

Head (fa) was inserted in that definition by the Offender Management Act 2007 (Consequential Amendments) Order 2008 with effect from 1 April 2008, *i.e.,* before the Practice Direction was given.

33. For the purposes of head (1)(h), a person fell within subsection (9) if:

> "(a) he has particular needs because of his age;
>
> (b) he has any form of disability;
>
> (c) he has a physical or mental problem of such description as is prescribed;
>
> (d) she is an expectant or nursing mother in receipt of residential accommodation pursuant to arrangements made under section 21(1)(aa) of the National Assistance Act 1948 or care pursuant to paragraph 1 of Schedule 8 to the National Health Service Act 1977 (c. 49);
>
> (e) he is a person of a prescribed description not falling within paragraphs (a) to (d)."

It is not clear that the regulation-making powers conferred by section 59(9)(c) and (e) were ever exercised.

34. The power (in section 59(1)(g)) to prescribe welfare services was first exercised by regulation 2 of the safeguarding Vulnerable Groups Act 2006 (Miscellaneous Provisions) Regulations 2009, with effect from 12 October 2009.

35. The reference to SVGA in Paragraph 1b gives rise to a number of problems.

The Protection of Freedoms Act 2012

36. The first such problem is that, for England and Wales, section 59 of SVGA has been repealed with effect from 10 September 2012 by section 15(2) of, and paragraph 1 of Part 5 of Schedule 10 to, the Protection of Freedoms Act 2012 ("PoFA").

37. Upper Tribunal Judge Shelley Lane explained the problem raised by that repeal in *JH(S) v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 567 (AAC) at [23]-[26]:

> "23 In addition to these difficulties, it seems to me that the Secretary of State's representative's interpretation of the provisions in issue is problematic following the amendments to the Safeguarding Vulnerable Groups Act 2006 made by the Protection of Freedoms Act 2012.
>
> 24 At the time the Practice Direction was formulated, the Safeguarding Vulnerable Groups Act 2006 defined 'vulnerable adult' to mean a person who had attained the age of 18 and who fell within 10 widely drafted categories (section 59). These included, for example, a person in residential accommodation or sheltered housing, receiving domiciliary care, in lawful custody, receiving certain welfare services, requiring assistance in the conduct of his own affairs (by reason of age, health or any disability), and receiving any form of health care. The definition reflected the assumption that individuals who fell within any of those categories were, because of that very fact, vulnerable. (This could mean, taking an extreme example, that a person receiving repeat prescriptions for aspirin from their GP would be a vulnerable adult). But the main thing to notice is that 'vulnerable adult' was a free-standing concept.
>
> 25 Section 59 was repealed for England and Wales by the Protection of Freedoms Act 2012. It was replaced by a definition which links vulnerability directly to the performance of certain activities for, or in relation to, that adult. So, section 60 defines 'vulnerable adult' as meaning:
>
> > 'any adult to whom an activity which is a regulated activity relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided'.
>
> Paragraph 7(1) of Schedule 4 (introduced by section 66(2) of Protection of Freedoms Act 2012) then provides that
>
> > '(1) Each of the following is a regulated activity relating to vulnerable adults
> >
> > (a) the provision to an adult of health care by, or under the direction or supervision of, a health care professional'
>
> 26 It now appears that it is *the activity* which governs the issue of who is vulnerable. A Tribunal is not a regulated activity, and a person is not vulnerable

> in relation to it. It is accordingly doubtful whether the linkage in the Practice Direction to the SVGA 2006 remains appropriate."

38. I agree with Judge Lane's analysis of the problem and with her doubts about whether the Practice Direction's continued definition of "vulnerable adult" by reference to SVGA remains appropriate. Indeed, for the reasons she outlines in paragraph 24 of her decision, and which I discuss at paragraphs 71-78 below, I must confess to doubts about whether the linkage was *ever* appropriate.

39. The question that arises in this appeal, however, is whether there is a solution to that problem.

40. If the reference in Paragraph 1b to "the Safeguarding Vulnerable Groups Act 2006" must now be interpreted as meaning "the Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012", then, for the reasons given by Judge Lane, the Practice Direction ceased to apply to vulnerable adults with effect from 10 September 2012, and—as the claimant was not a child and or (in my judgment) a sensitive witness—the First-tier Tribunal was not under any obligation other than that imposed by the overriding objective.

41. However, in my judgment, the reference in Paragraph 1b continues to be to SVGA as it was worded when the Practice Direction was made.

The Interpretation Act 1978

42. Two provisions of the Interpretation Act 1978 ("IA 1978") are potentially relevant, section 17(2)(a) and section 20.

43. Section 17(2)(a) provides:

> "(2) Where an Act repeals and re-enacts, with or without modification, a previous enactment, then, unless the contrary intention appears,—
>
> (a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;"

and section 20(2) provides:

> "(2) Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment including any other provision of that Act."

By section 23(1) IA 1978, both provisions "apply, so far as applicable and unless the contrary intention appears, to subordinate legislation made after the commencement of" IA 1978 on 1 January 1979. They must therefore be considered when interpreting the Practice Direction.

Section 17(2)(a)

44. Section 17(2) is forward-looking. It would serve no purpose if it could not apply to repeals and re-enactments occurring after IA 1978 came into force. Therefore, if the events described by Judge Lane in *JH(S)* (see paragraph 36 above) are properly regarded as the repeal of section 59 and its re-enactment in a modified form by the amended section 60, then—unless a contrary intention can be established—the results are as she described.

45. There can be no doubt that section 59 has been repealed. The interpretational difficulty lies in deciding whether the amendments to section 60 have "re-enacted" it. The issue is helpfully set out in *Craies on Legislation* (11th edition, ed. Greenberg, London 2017) (at paragraph 14.4.17):

> "The principal difficulty lies in knowing what amounts to a re-enactment. Obviously the section is not confined to cases where an old law is re-enacted in precisely the same substantive terms. The section also applies where a provision is re-enacted with modifications, which could amount to significant differences of substance. But presumably at some point a new law ceases to be a re-enactment of the old and becomes the imposition of an entirely new regime.
>
> The result of this uncertainty is that s.17 can safely be relied on only where it amounts to little or nothing more than a statement of the obvious. So where, for example, there is a real doubt as to how one should convert a reference to a provision of the old law into a reference to the new law, because there is insufficiently precise correspondence between the two sets of provisions, the answer is that s.17 should not be relied on to support the conversion at all. This limitation is the reason why it is common to find detailed transitional provisions in the context of anything that amounts to a consolidation with modifications, providing expressly for conversion of references and the like."

(Neither the PoFA itself, nor any relevant commencement order or other subordinate legislation made under it, contain detailed transitional provisions.)

46. In my judgment the changes made to section 60 of SVGA by PoFA do not amount to a re-enactment of the former section 59 "with … modification", so as to engage section 17(2), but to imposition of an new regime as described in *Craies*.

47. As explained by Judge Lane in *JH(S)*, the former definition was free-standing and based on the circumstances of the person concerned. Under the new definition those circumstances are no longer relevant. Instead, "it is *the activity* which governs the issue of who is vulnerable" so that if the activity is not regulated, the person cannot be a "vulnerable adult" in relation to it.

48. Such a change is not the same as, for example, the insertion of head (fa) into regulation 59(1) by the Offender Management Act 2007 (Consequential Amendments) Order 2008 (see paragraph 50 below), which merely adds to the definition while leaving its underlying structure intact. Rather, PoFA removed the old

definition altogether and added a new definition with a different structure and conceptual basis. To describe that process as "modifying" the definition would not be a correct use of the English language. Section 59 has not been repealed and re-enacted with modifications: it has been repealed and replaced with something entirely different.

49. Therefore section 17(2)(a) of IA 1978 does not apply to the change.

50. I have reached that conclusion as a matter of the interpretation of section 17, SVGA and PoFA. However, in case this appeal should go further, I should add that, had I reached a different conclusion, it would have been necessary for me to consider carefully whether the considerations set out at paragraphs 63-67 below evinced a contrary intention so as to disapply either section 17(2) itself or the application of that section to the Practice Direction by section 23(1).

Section 20(2)

51. As noted above, section 59(1) had been amended by the Offender Management Act 2007 (Consequential Amendments) Order 2008 before the Practice Direction was given. The effect of section 20(2) is that the reference in Paragraph 1b must be read as being to SVGA as amended by that Order.

52. It does not automatically follow, however, that section 20(2) requires that reference as being to SVGA as amended *after* the Practice Direction was made. Whether the reference is "ambulatory" in that sense depends on the proper construction both of the Practice Direction and of PoFA.

53. Again *Craies* is helpful here. As it explains at paragraphs 22.1.24–22.1.25:

> "The question is often asked whether this rule [*i.e.,* the rule in section 20(2)] applies to "future amendments.
>
> Suppose the following case: Act A refers to Act B, and Act C, which is passed after Acts A and B, amends Act B.
>
> Does s.20(2) mean that the reference in Act A to Act B is deemed to include a reference to Act B as amended by Act C?
>
> The simple answer is that it would be absurd to suggest that as a general rule Parliament is taken when referring to Act B to have included a reference to amendments that nobody at that time could possibly have known about.
>
> That does not, however, mean that the reference in Act A will necessarily exclude the amendment by Act C: that has to be determined by looking at all the circumstances and construing, in particular, the nature of the amendment made by Act C and the probable intention of Parliament in

> passing it, as well as the nature of the reference made by Act A and whether Parliament probably expected it to be ambulatory.
>
> For example, a reference to "local authorities within the meaning of \a provision elsewhere listing them and conferring power to amend the list\" is likely to be expected to be ambulatory, since it locks into a fluid system.
>
> While on the other hand, where an enactment about cats adopts a definition of mouse in a Act about mice, and the law of the mice is then thoroughly overhauled by a later enactment, it may not be safe to assume that the legislature in amending the law about mice had in mind an obscure application elsewhere in the statute book.
>
> The care that needs to be taken in applying s.20(2) is therefore an excellent example of the principle that the only rule about construction that can be applied dogmatically in all circumstances is that no rule of construction can be applied dogmatically in all circumstances"

54. In support of those propositions, *Craies* refers to the decision of the High Court (Nourse J, as he then was) in *Willows v Lewis (Inspector of Taxes*) [1982] STC 141. In that case, the claimant was entitled to a mobility allowance and the issue was whether he was liable to income tax under Schedule E in respect of it.

55. That issue arose because of the way in which mobility allowance was introduced:

(a) The law of social security was consolidated by the Social Security Act 1975 ("the Social Security Act"), which came into force on 6 April 1975.

(b) Before that date, section 219(1)(a) of the Income and Corporation Taxes Act 1970 ("ICTA") imposed a charge to income tax under Schedule E on:

> "(a) payments of benefit under the National Insurance Act 1965, or the National Insurance Act (Northern Ireland) 1966, except (within the meaning of those Acts) unemployment benefit, sickness benefit, maternity benefit and death grant …"

(c) However, also with effect from 6 April 1975, section 1(3) of, and paragraph 39(a) of the Social Security (Consequential Provisions) Act 1975 ("the Consequential Provisions Act") amended section 219(1)(a), so as to impose the charge to tax on:

> "(a) payments of benefit under *Chapters I to III of Part II of the Social Security Act 1975* or Chapters I to III of Part II of the Social Security (Northern Ireland) Act 1975, except unemployment benefit, sickness benefit, invalidity benefit, attendance allowance, maternity benefit and death grant," (my emphasis).

(d) As enacted, the Social Security Act made no provision for a mobility allowance. However, that Act was amended by s 22 of the Social Security Pensions Act 1975 ("the Pensions Act"), which provided for a mobility allowance by inserting a new section 37A after section 37 in Chapter II of Part II of the former Act.

(e) The Pensions Act did not receive Royal Assent until 7 August 1975. Thus mobility allowance did not exist at the time when section 219(1)(a) of ICTA was amended by the Consequential Provisions Act.

(f) The question therefore arose whether the reference to "Chapters I to III of Part II of the Social Security Act" in section 219(1)(a) of ICTA should be read as a reference to Chapters I to III of Part II of the Social Security Act as amended by the Pensions Act.

56. Nourse J decided in favour of the claimant that it should not, even though ICTA contained, in section 540(3), a provision that was in very similar terms to section 20(2) of the Interpretation Act, namely:

> "(3) Any reference in this Act to any other enactment shall, except so far as the context otherwise requires, be construed as a reference to that enactment as amended or applied by or under any other enactment, including this Act."

The learned judge commented:

> "The commissioners [*i.e.,* the former Special Commissioners of Income Tax] were of the view that, since there was nothing in the context requiring otherwise, the reference in s 219(1)(a) as amended to the Social Security Act 1975 was to be construed as a reference to that Act as amended by s 22 of the Social Security Pensions Act 1975, albeit that the latter Act did not become law until four and a half months after the Social Security Act 1975 and the Social Security (Consequential Provisions) Act 1975. *That view involves reading the words 'that enactment as amended... by... any other enactment' as including amendments made under any other future enactment, whenever passed. In my judgment that is to give to s 540(3) a width of application which wording at the best equivocal cannot bear, particularly in a taxing statute. The words are equally, and I would say more naturally, capable of referring only to amendments made on or before the passing of the 1970 Act itself and I find it impossible to say that they go, or were intended to go, further than that*. Both the taxpayer and counsel as amicus accept, in my view rightly, that the amendment on 20 March 1975 of s 219(1)(a) must be taken to have re-enacted s 540(3) as at that date. But that does not enable the Crown to bring in an amendment to the Social Security Act 1975 made after that date." (my emphasis).

57. Counsel for the Crown had submitted that:

> "What has to be determined is Parliament's intention as to the combined effect not of the Social Security (Consequential Provisions) Act 1975 alone, but of [ICTA] and s 22 of the [Pensions Act] as well."

Nourse J appears to have accepted that submission, but held that, as section 540(3) of ICTA did not have the express effect that mobility allowance fell within section 219(1)(a), any Parliamentary intention to tax mobility allowance had to a matter of implication and:

> "[h]ere the Crown runs into a difficulty. Consistently with the principles on which implications are made, it would appear that what is to be implied must not be in doubt. It is possible that if s 219(1)(a) had not allowed any exceptions there would have been no doubt. But the form taken by that provision is to make a general charge with specified exceptions. Further, Chapter II of Part II of the Social Security Act 1975 included both taxable and non-taxable benefits. An example in the former category was guardian's allowance and in the latter attendance allowance. There were therefore two possibilities on 7 August 1975. Section 219(1)(a) could either have been re-enacted as it stood or with an amendment to allow for a further exception. Why, when the company into which mobility allowance was introduced included both taxable and non-taxable benefits, should it be assumed that Parliament intended to house it in the generality rather than amongst the exceptions? The Crown's answer to that question is that, there having been no express amendment, it is clear that the re-enactment was made without amendment. But that begs the question whether a re-enactment can be implied at all. And it involves a step which cannot in my view be taken on accepted principles of statutory construction."

58. *Willows v Lewis* has subsequently been considered without disapproval by Divisional Courts of the Queen's Bench Division in *Mayne and Chitty Wholesale Limited v Ministry of Agriculture, Fisheries and Food* [2000] EWHC Admin 368 and *Department of Food and Rural Affairs v Asda Stores Ltd and another* [2002] EWHC 1335 (Admin) but those were criminal cases where different considerations apply. In the *ASDA Stores* case, the Divisional Court's decision was reversed (without express reference to *Willows v Lewis*) by the House of Lords ([2003] UKHL 71). However, that was because their Lordships decided as a matter of construction that, given the UK's obligations as a Member State of the European Community, the reference was ambulatory. Different considerations also apply in those circumstances: see, further, *Craies* (paragraph 52 above) at paragraphs 22.1.26 – 22.1.27.

Why the reference in Paragraph 1b is not ambulatory

59. I draw the following principles from paragraphs 52-57 above. In cases that do not involve the repeal and re-enactment of the legislation concerned, so as to engage section 17(2)(a) of IA 1975:

(a) references to a piece of legislation in another piece of legislation are not automatically ambulatory; but

(b) they may be ambulatory in a particular case; and

(c) whether the reference in Paragraph 1b is ambulatory has to be determined by looking at all the circumstances and in particular:

(i) the nature of the reference;

(ii) whether the Senior President probably expected it to be ambulatory;

(iii) the nature of the amendment made to section 59 of SVGA by PoFA; and

(iv) and the probable intention of Parliament in passing the latter Act.

I must also bear in mind that I have to interpret the Practice Direction so as to give effect to the overriding objective (see paragraph 25 above).

60. Applying those principles, I judge that the reference in Paragraph 1b is not ambulatory and that it therefore continues to be to section 59 of SVGA as it was worded on 30 October 2008 when the Practice Direction was made.

61. The only thing the Practice Direction has to do with safeguarding vulnerable adults is that it potentially applies when people whose names have been added to one or more of the barred lists by the Disclosure and Barring Service exercise their right of appeal to the Upper Tribunal under section 4 of SVGA. It is therefore improbable that the Senior President wished the Practice Direction, as it relates to vulnerable adults, to be construed *in pari materia* with the legislation on safeguarding vulnerable groups.

62. The Practice Direction needed to define who counted as a "vulnerable adult". Such a definition would have lengthened the Direction and would have been difficult to draft. It is probable that no more was intended by the reference in Paragraph 1b than to simplify both the text and the drafting, by adopting an off-the-peg definition that was already in use. With hindsight, and the additional focus that comes from having to apply the definition in individual cases, it can be questioned whether the definition chosen was fit for purpose. But that does not mean that the Senior President's intention in referring to SVGA was otherwise than is suggested above.

63. Once that is appreciated, it must also follow that the Senior President did not intend the reference to be ambulatory. It is inconceivable that he can have intended that, without any input from him—or from the Lord Chancellor, whose approval he is required to obtain before making or amending a practice direction—all adults who do not fall within the definition of "sensitive witness" should automatically cease to have the protection of the Practice Direction if Parliament subsequently chose to amend or repeal the definition of "vulnerable adult" in SVGA.

64. I turn next to the likely intention of Parliament. The starting point has to be that Parliament cannot have known when it passed SVGA in its original form on 8 November 2006 that, nearly two years later, the Senior President of Tribunals (which was not an office that existed at that time) would refer to SVGA in a practice direction.

65. I will not lengthen this decision with a detailed examination of PoFA. Suffice it to say, that I have considered that Act and I can find nothing anywhere—including the amendments made to SVGA—that evinces any Parliamentary intention to change the procedure or practice of the First-tier Tribunal or the Upper Tribunal as it relates to vulnerable adults.

66. Perhaps the easiest way of making the point is to note that the comprehensive long title of PoFA, namely:

> "An Act to provide for the destruction, retention, use and other regulation of certain evidential material; to impose consent and other requirements in relation to certain processing of biometric information relating to children; to provide for a code of practice about surveillance camera systems and for the appointment and role of the Surveillance Camera Commissioner; to provide for judicial approval in relation to certain authorisations and notices under the Regulation of Investigatory Powers Act 2000; to provide for the repeal or rewriting of powers of entry and associated powers and for codes of practice and other safeguards in relation to such powers; to make provision about vehicles left on land; to amend the maximum detention period for terrorist suspects; to replace certain stop and search powers and to provide for a related code of practice; to make provision about the safeguarding of vulnerable groups and about criminal records including provision for the establishment of the Disclosure and Barring Service and the dissolution of the Independent Safeguarding Authority; to disregard convictions and cautions for certain abolished offences; to make provision about the release and publication of datasets held by public authorities and to make other provision about freedom of information and the Information Commissioner; to make provision about the trafficking of people for exploitation and about stalking; to repeal certain enactments; and for connected purposes"

does not mention tribunals or procedure and only includes the word "practice" as part of the phrase "Code of Practice".

67. Far less is any intention evinced to make the *particular* amendment that is in issue here, *i.e.,* to deprive vulnerable adults of the protection given by the Practice Direction by removing them from its scope. Why would Parliament wish so to disadvantage vulnerable adults?

68. In those circumstances, I judge that the current case is analogous to the example given in *Craies* about the law of cats and mice (see paragraph 52 above). Not only is it not safe to assume that the legislature in amending the law about safeguarding vulnerable groups had in mind an obscure reference in a practice direction; it is extremely improbable that it had it in mind.

69. Finally, those conclusions are strengthened by the fact that interpreting the reference in paragraph 1b of the Practice Direction as ambulatory deprives it of effect as it relates to one of the groups of intended beneficiaries. In my judgment, such an interpretation does not tend to give effect to the overriding objective of dealing with matters fairly and justly. For that reason as well, I conclude that the reference is not ambulatory but continues to refer to section 59 of SVGA as it was

worded on 30 October 2008 despite the fact that that section has subsequently been repealed.

The scope of the definition

70. Unfortunately, the problems do not stop there.

71. Once it is accepted that the reference in Paragraph 1b is to the section 59 of SVGA as it was worded on 30 October 2008, tribunals that are bound to apply the Practice Direction in individual cases have to grapple with the inadequacy of that definition in relation to judicial proceedings and, in particular, the fact that if it is read literally, the definition is over-inclusive to an extent that risks undermining the Practice Direction's utility.

72. Take, for example, head (d) of subsection 59(1), which has the effect that anyone over the age of 18 who "receives any form of health care" is a vulnerable adult. Lest it might be thought that those words are insufficiently wide on their own, "health care" is further defined by section 59(6) as "including treatment, therapy or palliative care of any description"

73. In *JH(S)* (paragraph 36 above) Judge Lane observed that the effect of section 59 was that "taking an extreme example, … a person receiving repeat prescriptions for aspirin from their GP would be a vulnerable adult".

74. But there is no need to take extreme examples to produce absurdity. Anyone who is under the continuing care of anyone who provides anything that can be described as health care "including treatment, therapy or palliative care of any description" falls within the definition and is deemed vulnerable. That is probably broad enough to include someone who visits a chiropodist regularly; who has a therapist; or who receives homeopathy or aromatherapy. It is certainly broad enough to cover, for example, those who suffer from asthma or who receive medication from their GPs to ameliorate the anatomical and physiological deterioration normally experienced by the human body as it ages. I have in mind painkillers for arthritis, and drugs for high blood pressure and high cholesterol.

75. Some of those conditions may be asymptomatic and many who suffer from them will not regard themselves as ill or disabled. In some cases, the treatment may even be a placebo. Nevertheless, as long as they are over 18, section 59(1)(d) and (6) has the effect that anyone in receipt of such treatment falls within the scope of the Practice Direction. The realisation, during the course of this appeal, that I am myself a "vulnerable adult" has come as something of a shock.

76. The breadth of the definition is easy to understand in the safeguarding context. Receiving health care can involve discussing personal, intimate and confidential matters and submitting to being touched in ways to which one would not normally consent. It can even involve having items such as catheters and nasal-gastric tubes physically inserted in one's body, or having blood and tissue removed for testing by histologists and pathologists.

77. In agreeing to such discussions, and submitting to such treatment, one inevitably makes oneself more vulnerable (in the meaning that word bears in ordinary English). It is therefore no surprise that Parliament has decided that people should not receive health care from individuals who have been convicted of certain types of offence or have otherwise exhibited undesirable proclivities.

78. But it does not follow that everyone who receives health care is in need of special consideration when participating in proceedings before a tribunal.

79. Similar points could be made about most other heads of section 59(1). I shall not, however, labour matters further by doing so.

Practical implications

80. Rather, I shall turn to the practical implications of this for tribunals and in particular for the work of the Social Entitlement Chamber.

The Social Entitlement Chamber

81. The overwhelming majority of appeals that come before the Social Entitlement Chamber involve entitlement to employment and support allowance and personal independence payment. Almost without exception, adult appellants in such appeals will be receiving some form of health care and will therefore be "vulnerable adults" for the purposes of the Practice Direction. The same is likely to be true of those appealing against decisions on industrial injuries benefits. It will often also be true of those whose appeals relate to other benefits. For example, anyone old enough to be appealing about a retirement pension decision is likely to be on some kind of medication.

82. For those reasons, the rejection of an interpretation that would mean no-one was a vulnerable adult for the purposes of the Practice Direction involves adopting an interpretation that, in practice, means a large majority of appellants before the Social Entitlement Chamber will be vulnerable adults.

83. And in each such case, the effect of *AM (Afghanistan)* (see paragraph 28 above) is that failure to follow the Practice Direction and "to consider how to facilitate the giving of any evidence" by such an appellant "will most likely be an error of law".

84. However, there will be many cases in which failure to follow the Practice Direction, though an error of law, is unlikely to be a *material* error of law.

85. Appearing before a tribunal is a stressful experience for many claimants. But the Tribunal's normal procedures reflect that. Although attending a tribunal hearing will often be the most formal thing a person has ever done (except, possibly getting married), it is much less formal than a court hearing. The Tribunal's role is inquisitorial and enabling. The presence of a doctor, and—in PIP cases—a person with experience on the needs of people with disabilities, means that it is usually

possible for the Tribunal to elicit the necessary information by questioning the claimant so that it is unnecessary for claimants to act as their own advocates. Claimants are entitled to be accompanied to hearings and arrangements can be made to assist those who have difficulty travelling to and from the tribunal venue.

86. Those features of procedure in the Social Entitlement Chamber are there to further the overriding objective and to help ensure "so far as practical, that the parties are able to participate fully in the proceedings". Given their existence, it will often not be necessary to adapt those procedures further to facilitate the giving of evidence, even though the appellant falls within the broad definition of "vulnerable adult". A claimant whose disabilities are entirely physical will probably be able to give evidence following the usual procedure, unless those disabilities affect, speech, hearing, or (in some circumstances) vision, or involve physical damage to, or abnormal development of, the brain. For example, there is no obvious reason why a person whose only disability is arthritis should not be able to give evidence in the same way as someone who is not disabled. And, at least where the disability affects speech or hearing, special arrangements are likely to have been made in advance of the hearing.

87. There will also be cases involving mental disabilities where a failure to follow the Practice Direction will not involve a material error of law. Many people with (for example) mild to moderate depression are able to explain themselves to the First-tier Tribunal by answering questions in the normal way, at least where cognition is not impaired.

88. In circumstances where it can be said that considering in advance how to facilitate the giving of evidence by a vulnerable adult would have made no difference to the way in which the Tribunal in fact conducted the hearing, it is unlikely that the First-tier Tribunal will be held to have made a *material* error of law, even if it has erred by failing to follow the Practice Direction.

89. However, whether or not a failure to follow the Practice Direction is material falls to be decided on the facts of each individual case. The First-tier Tribunal would therefore be well-advised to adopt the practice of considering—as part of the its preview of each appeal—whether special arrangements need to be adopted to facilitate the giving of evidence.

90. Such arrangements might perhaps be no more than deciding that what would normally be regarded as an acceptable robust style of questioning was not appropriate in an individual case.

91. In circumstances where special arrangements have been put in place—or where there might be doubt as to whether they should have been—it would be wise for the tribunal to record briefly in its record of proceedings that the Practice Direction had been considered. A single sentence should suffice. If a written statement of reasons is requested in such a case, the statement must then explain what the tribunal decided about the requirements of the Practice Direction and why.

Representatives

92. The Practice Direction also has implications for representatives. Under rule 2(3) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, the parties are under a duty to help the First-tier Tribunal further the overriding objective and to co-operate with the Tribunal generally.

93. It is does not further the overriding objective (which, by rule 2(e) includes the avoidance of delay, so far as compatible with proper consideration of the issues) if the Tribunal only learns of the need for special arrangements on the day of the hearing and then has to adjourn so that those arrangements can be put in place.

94. Representatives who consider that the Practice Direction requires special arrangements to be made to enable their clients to participate fully in the proceedings should therefore write to the Tribunal at the earliest opportunity and request the necessary directions. Such a request should give details of the specific arrangements that are considered desirable and be realistic about the sort of arrangements the Social Entitlement Chamber is likely to be able to make.

95. I appreciate, of course, that representatives are sometimes instructed late in the day. However, where an experienced and competent representative has been on the record for a significant period and special arrangements have not been requested, that is a factor—not the *only* factor, but *a* factor—that the Tribunal may take into account when deciding whether special arrangements are needed.

Reasons for the Upper Tribunal's decision

96. There are cases in which deciding whether a failure to follow the Practice Direction is material will involve difficult questions, requiring close analysis and judgment.

97. This is not such a case.

98. Wherever the line between material and immaterial is to be drawn, failing to follow the Practice Direction where a claimant has a documented diagnosis of autistic spectrum disorder is on the wrong side of it.

99. I therefore judge that the First-tier Tribunal made a material error of law by failing to follow the Practice Direction in this case or, alternatively, if it did so, by failing to record that it had done so and to explain its apparent decision that no special arrangements were appropriate. I set the First-tier Tribunal's decision aside and, as it is not expedient that I should re-make the decision myself, I remit the case to the new tribunal for reconsideration in accordance with the directions set out on pages 1 and 2 above.

100. I must ask the parties to accept my apologies for not having done so sooner.

***JH(S) v Secretary of State for Work and Pensions (ESA)* revisited**

101. I am acutely conscious that this decision establishes the state of affairs referred to by Judge Shelley Lane in JH(S) when she said at [22]:

> "(iv) If the Secretary of State's argument were to be carried through to its conclusion, the Practice Direction would impose on a Tribunal dealing with such a person a duty consciously to consider the Practice Direction – on pain of error of law - even though it would consider substantially the same range of considerations in pursuance of its duties under the Procedure Rules, common law and ECHR law on fairness. This would mark the triumph of form over substance."

102. I acknowledge the force of those considerations. However, the decision in *JH(S)* was made before the decision of the Court of Appeal in *AM (Afghanistan)*. Given that later decision, I judge that I am now bound to hold that a failure to follow the Practice Direction will amount to an error of law. The consequences that are described in *JH(S)* follow inexorably.

Coda

103. I would add this. An editor's note to the reported version ([2015] AACR 2) of *JP v Secretary of State for Work and Pensions* (DLA) (see paragraph 29 above) records that:

> "On 29 July 2014 the Senior President of Tribunals announced his intention to revise the Practice Direction for the First-tier and Upper Tribunal on Child, Vulnerable Adult and Sensitive Witnesses to bring it into line with developments in the law in this field."

More than five years later, the Practice Direction remains unchanged. As is apparent from the decisions in *JP*, *JH(S)* and this appeal, the Practice Direction leads to legal complications that, at least as it applies to the Social Entitlement Chamber of the First-tier Tribunal, make it difficult to follow in practice. I express the hope that the proposed revision referred to above can now be rapidly completed. In particular, it would be helpful to have a more focussed definition of "vulnerable adult". The current position—where almost every adult who appears before the Social Entitlement Chamber falls within the definition and therefore, strictly, is required to be treated as a special case—is clearly unsatisfactory.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

1 July 2019