IN THE UPPER TRIBUNAL **Appeal No.** CE/1285/2018
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Perez

Decision

1. I set aside the Upper Tribunal decision dated 14 September 2018.

2. I allow the claimant's appeal. The decision of the First-tier Tribunal dated 8 March 2018 (heard under reference SC327/17/01090) is set aside. The case is remitted to the Social Entitlement Chamber of the First-tier Tribunal. I direct that it be reheard afresh by a completely differently constituted panel.

Background

3. Following the Upper Tribunal decision of 14 September 2018 dismissing his appeal, the appellant applied for a set-aside of that decision. He asked in the alternative for permission to appeal to the Court of Appeal.

4. I gave directions on 9 January 2019. I proposed that I either (a) set aside the Upper Tribunal decision of 14 September 2018 for procedural irregularity under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 or (b) set the decision aside on review under rules 45 and 46 of those rules for overlooking a legislative provision. I said I favoured rule 43, subject to submissions. I proposed also to allow the appeal to the extent of remittal.

Grounds on which I would have set aside on review

5. The grounds on which I would have set aside on review under rules 45 and 46, had the parties chosen that route, were that the Upper Tribunal overlooked rules 2(2)(b), 2(2)(c) and 31(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. The Upper Tribunal failed to consider whether those rules had been breached in the ways I mention later in this decision.

6. In the event, the parties chose the rule 43 route, for the reasons given in my directions of 9 January.

Upper Tribunal decision on setting aside

7. I am therefore setting aside under rule 43 the Upper Tribunal decision dated 14 September 2018, on the following grounds.

8. The appellant had not wanted his First-tier Tribunal hearing to be chaired by First-tier Tribunal Judge Stedman, who the appellant had prior to the hearing said (page 190) was biased. That judge did sit on the panel. Before the hearing started, the tribunal sent the clerk out to talk to the appellant about the fact that Judge Stedman was on the panel. I have set out at the annex to this decision the parts of

the record of proceedings and the statement of reasons which dealt with this. The First-tier Tribunal recorded the following as the outcome—

> "In this appeal the Appellant did not even enter the room as he had been informed by the court clerk that I was sitting on the panel to decide his appeal" (paragraph 4, page 207).

9. In her decision dated 14 September 2018 dismissing the Upper Tribunal appeal, the Upper Tribunal judge said there was no error of law in the failure of the First-tier Tribunal judge to recuse himself.

Procedural irregularities

10. The Upper Tribunal proceedings resulting in the Upper Tribunal decision of 14 September 2018 contained procedural irregularities, for the reasons below.

Procedural irregularities in the First-tier Tribunal proceedings

11. The parties agree – and I find – that the First-tier Tribunal proceedings had the following procedural irregularities.

(1) No apparent interpreter for HCP assessment

12. There was an apparent failure to use an interpreter for the HCP assessment (pages 131 and 141). The appellant had requested an interpreter for that assessment (page 60). That the appellant genuinely perceived the need for an interpreter, especially for the formal processes of the HCP assessment and tribunal proceedings, was evidenced by his use of an interpreter for his consultation with his haematologist (page 40). This failure was a procedural irregularity in conducting the HCP assessment and in producing the report based on that assessment. The First-tier Tribunal's reliance on that assessment rendered irregular its own decision-making, by incorporating into it the flawed HCP procedure and/or by making a decision without having before it a document – the HCP report – produced using an interpreter.

(2) No record of interpreter for clerk's exchange with appellant

13. An interpreter is not recorded as having been used for the First-tier Tribunal's message to the appellant via the clerk either. The appellant had requested an interpreter for the hearing (page 30). The First-tier Tribunal found that the appellant "had no difficulties voicing his concerns in the English language" (paragraph 8, page 208). Even if that could be taken as referring to the appellant's needs for the purpose of the clerk passing on the tribunal's message (and it didn't seem to be aimed at that), it was not for the First-tier Tribunal to substitute its own judgment of how fluent and confident the appellant was in English for the purposes of legal proceedings. This is especially so given that the appellant had used an interpreter for his NHS consultation (page 40). Moreover, neither member of the First-tier Tribunal panel had previously met the appellant on this appeal. If the judge was basing his pre-judgment of the appellant's language abilities on the judge's previous meetings with the appellant on other appeals, that was not open to him. There was nothing to suggest that this panel as constituted had ever met the appellant at all.

So it seems the other member of the First-tier Tribunal panel had no way of judging the point for himself.

14. This was also a breach of rule 2(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. Proceeding in the appellant's absence without apparently having ascertained that he had had the opportunity, through an interpreter, to understand his options, was a failure to ensure so far as practicable that the appellant was able to participate fully in the proceedings.

(3) Deemed application for recusal

15. The First-tier Tribunal treated the appellant's non-appearance in the hearing room as an application for recusal (ROP, page 202) rather than as an application for an adjournment. That inference, leaving aside issues of translation, was not open to the First-tier Tribunal given that the message it had intended to convey and believed it had conveyed was about applying for an adjournment (ROP, page 201, SOR, paragraph 8, page 208).

(4) Sending clerk out to speak to the appellant

16. The First-tier Tribunal adopted an irregular procedure in pre-empting the appellant coming into the hearing room by, of its own motion, sending the clerk out to speak to the appellant about Judge Stedman being on the panel. This made it more likely that the appellant would not come into the hearing room at all. I say that first because he now had no need to enter the room to see who the judge was. Second, because the very fact of sending the clerk out to the appellant of the tribunal's own motion could be perceived as intimidating; the First-tier Tribunal was raising an issue and confronting the appellant – a shot across the bows – before he had even entered the room.

17. This was also a breach of rule 2(2)(c). Causing – even if unintentionally – the appellant not to enter the hearing room was a failure to ensure so far as practicable that he was able to participate fully in the proceedings.

(5) Use of unnecessarily formal language and of non-plain English

18. For the clerk to tell the appellant "the tribunal will be happy to hear any application you wish to make" was unnecessarily formal and not plain English. How was an unrepresented lay appellant being addressed in his non-native language apparently without an interpreter meant to understand what is meant by "application"? This was a failure to comply with the requirement in rule 2(2)(b) to avoid unnecessary formality and to seek flexibility in the proceedings.

(6) Apparent removal of option to make written application

19. Moreover, to refer to "hearing" an application in the message the clerk was to give would prima facie suggest to an unrepresented lay appellant (and indeed may even have been intended by the panel to mean) that the only way the appellant could make an application of any kind was by being "heard", that is, by being in the room with the panel and speaking to them (which the appellant did not want to do). It removed from him the flexibility of making a written application. The First-tier

Tribunal said in paragraph 8 of the statement of reasons that "Through the court clerk the tribunal communicated to the appellant … that he could make an application, either in person or in writing, for his case to be adjourned" (page 208). The wording in the record of proceedings on page 201, to which the First-tier Tribunal referred as the record of the message, did not however say that the application could be in writing – it said only that the tribunal would "hear" any application. This too was a failure to comply with the requirement in rule 2(2)(b) to avoid unnecessary formality and to seek flexibility in the proceedings.

(7) Failure adequately to apply rule 31(b)

20. The First-tier Tribunal failed adequately to apply the requirement in rule 31(b) that it be in the interests of justice to proceed in the appellant's absence. The First-tier Tribunal's only potential reference to the interests of justice was its statement that "there was no issue as to fairness" (paragraph 9, page 209). That did not suffice for rule 31 in the circumstances of this case. The First-tier Tribunal erred in law in finding that it had sufficient evidence to decide the appeal when it had before it a challenge to the HCP assessment on two grounds: first that it contained "factual inaccuracies and untruth [sic] information", and second, that it was done without an interpreter (pages 131 and 141). The First-tier Tribunal needed the appellant's oral evidence, or his further written evidence, to explain what inaccuracies and untruths there were.

Procedural irregularities in the Upper Tribunal proceedings

21. The irregularities in the First-tier Tribunal proceedings, mentioned at paragraphs 12 to 20 above, caused irregularities in the Upper Tribunal's decision-making (rule 43(1)(b) and (2)(d)). I say that because the Upper Tribunal process was based on an irregularly produced First-tier Tribunal decision.

Interests of justice

22. It is not disputed – and I find – that it is in the interests of justice to set aside the Upper Tribunal decision dated 14 September 2018 (rule 43(1)(a)). The appellant deserves the opportunity fully to participate in a fair and impartial hearing, conducted accessibly. He also is entitled to have the First-tier Tribunal properly weigh the evidence and any flaws in the evidence, such as the HCP assessment apparently having been done without an interpreter.

New Upper Tribunal decision on the appeal

23. Now that I have set aside the Upper Tribunal decision dated 14 September 2018, the Upper Tribunal appeal is again before the Upper Tribunal. I allow that appeal for the following reasons.

Errors of law

24. The parties are agreed – and I find – that the making of the First-tier Tribunal decision involved the following errors of law.

(1) Procedural errors

25. The First-tier Tribunal's procedural failings mentioned in paragraphs 12 to 20 above were material errors of law.

(2) Appearance of bias

26. The First-tier Tribunal further erred in giving an appearance of bias.

27. First, the First-tier Tribunal's finding that the appellant "had no difficulties voicing his concerns in the English language" (paragraph 8, page 208) showed bias. It appeared based on knowledge of the appellant which could have been gained only from previous hearings in other cases, since there is nothing to suggest that the appellant had met this First-tier Tribunal panel on this case.

28. Second, the same goes for the First-tier Tribunal's finding that "there was no issue as to his ability or mental competence in his presenting his case and that in fact he was an insightful and intelligent man who was more than able to speak for himself" (paragraph 9, page 209).

29. Third, there was an appearance of the tribunal having prejudged – and having conveyed to the appellant that it had prejudged – the outcome of any application the appellant might wish to make: "the appellant … had made a decision not to give evidence in circumstances where the tribunal had indicated that it was likely to decide his appeal" (paragraph 9, page 209). This suggests that the message the First-tier Tribunal had intended to convey via the clerk was not merely that the tribunal "would like to deal" with the appeal, but that it was "likely" to do so regardless of any application.

(3) Erroneous ground for distinguishing previous appeal

30. In dealing with the fact that the chair of the present First-tier Tribunal panel had dealt with two of this appellant's previous appeals, the First-tier Tribunal said: "Similarly, that I had very recently presided over a PIP appeal which did not proceed – albeit there were credibility issues sufficient to be unable to proceed on the day, had no bearing on the legal issues under the current appeal" (my emphasis, paragraph 6, page 208).

31. The First-tier Tribunal erred in law in distinguishing the "current appeal" from the PIP appeal on the apparent ground that credibility was not in issue and that the issues in the present appeal were only "legal". Credibility clearly did come into the present appeal, even if the tribunal did not say so expressly. The First-tier Tribunal rejected at paragraph 14 the appellant's reported evidence of the distance to his children's school (which the appellant had in any event disputed having said to the HCP, page 33). It rejected his evidence of the distance to his local supermarket (paragraph 14, pages 209 and 210). It rejected his evidence that, when he took his daughters to the sea front, he would walk for five minutes only (paragraph 14, page 210). And it rejected his evidence of not being able to walk 50 metres without stopping (paragraph 15, page 210).

(4) Assumption as to exchange between clerk and appellant

32. The First-tier Tribunal's reasoning was inadequate, and its findings not supported by the evidence, in its assumption that the clerk had "premised the information in simple straightforward language so that there was no chance of a misunderstanding" (paragraph 8, page 208). It appears the tribunal had no way of knowing whether the clerk had repeated exactly what he was instructed to say and only what he was instructed to say. The tribunal did not even record that it had been told this by the clerk.

(5) Failure to consider reasonable adjustments

33. The First-tier Tribunal erred in law in failing to consider whether the appellant would need and be given reasonable adjustments for the back pain which it found "he probably continue [sic] to experience" and which "flared up on occasion" (paragraph 18, page 210).

Disposal of this Upper Tribunal appeal

34. Both parties said they would not object to the Upper Tribunal referring the case for redetermination by a completely differently constituted First-tier Tribunal (that would not include Judge Stedman and would not include Dr Warwick). It is appropriate to remit because evidence will need to be taken and weighed which the First-tier Tribunal is usually better placed to do.

Rachel Perez
Judge of the Upper Tribunal
18 April 2019

Annex to Upper Tribunal decision

Evidence of the First-tier Tribunal's dealings with the appellant outside the hearing room via the clerk

The record of proceedings said—

> "Proceed on papers. App't decides not to give evidence – see ROP.
> Last week Mr Farkas left before the case was Adjourned because whilst it was a PIP appeal he said he was discriminated against as I had previously (2016) refused his ESA appeal. The PIP Appeal was Adj for App't [to] take advice on continuation in light of Trib power to t/a his award –(S)DL only.
> So today: Clerk to speak to him before coming in. Mr F – thank you for coming today The Trib would like to deal with your appeal.
> The Trib is comprised of Mr A. Stedman and Dr. Warwick.
> The Appeal will go ahead today unless there is a reason why you say it should not. The Trib will be happy to hear any application you wish to make.
> Trib Clerk has spoken to App't and he said that he is not coming in and will let appeal go ahead and has submitted couple papers evidence for consideration.
> Tribunal proceed to decide on papers – Benchbook consulted. No grounds made to exempt Trib / Judge made out. No issue of bias. Appellant has left.
> PO – submissions:" (pages 199 to 202).

The tribunal described this in the statement of reasons as follows—

> "8. The court clerk spoke to the appellant outside the hearing room prior to the hearing and informed him that the tribunal would be hearing his appeal and would like to hear him give evidence. A note of the wording appears in the record of proceedings (page 201). It was important that there was no misunderstanding on the part of the appellant. Through the court clerk the tribunal communicated to the appellant that it could fairly and justly determine his appeal, but that he had a right to be heard by the tribunal if he was dissatisfied with this decision and that he could make an application, either in person or in writing, for his case to be adjourned. The clerk premised the information in simple straightforward language so that there was no chance of a misunderstanding. The tribunal was satisfied that the appellant was aware that he could ask the tribunal for an adjournment, on whatever ground he wished, and that the tribunal would hear him. The appellant declined to enter the hearing room and soon after left the building. The tribunal found that the appellant had no difficulties voicing his concerns in the English language and had the benefit of an interpreter in any event" (page 208).