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 Birmingham First-tier Tribunal dated 26 April 2018 under file reference SC024/16/06355 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's original decision dated 29 September 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply:

(1) The Upper Tribunal office should return the file to the HMCTS regional tribunal office in Birmingham; however, once the outcome of the appeal has been duly noted and any appropriate action taken, the file should then be transferred to the HMCTS regional tribunal office in Cardiff for re-listing (as the Appellant has since moved to the South West). The case should not be listed for the Plymouth venue.

(2) The new First-tier Tribunal (FTT) should not involve the tribunal judge or medical member involved with this appeal on 26 April 2018.

(3) The Appellant should confirm with the HMCTS regional tribunal office in Cardiff within one month of the date of issue of this decision whether she wishes to have an oral hearing of her remitted appeal.

(4) If the Appellant has any further written evidence to put before the new FTT, this should be sent to the HMCTS regional tribunal office in Cardiff within one month of the date of issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (i.e. 29 September 2016).

(5) The District Tribunal Judge (DTJ) responsible for re-listing arrangements should direct that the Appellant is sent the standard consent form for disclosure of her medical records.

(6) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds; but there will need to be a completely fresh hearing of the original appeal before a new First-tier Tribunal.

The Upper Tribunal's decision in summary and what happens next

2. The Birmingham First-tier Tribunal's decision involves a legal error as it did not adequately explain why it proceeded with the hearing in the Appellant's absence. I therefore set aside the Tribunal's decision.

3. The case now needs to be reheard by a new First-tier Tribunal. As the Appellant has since moved from the Midlands to the South West, that re-hearing needs to be in the Wales & South West HMCTS region. The appeal file will need to be transferred between the two HMCTS regional offices in Birmingham and Cardiff respectively.

4. I cannot predict what will be the outcome of the re-hearing. So, the new tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes when applying the relevant law.

The background to this appeal to the Upper Tribunal

5. The Appellant suffers from several medical conditions, including gynaecological problems and difficulties with bowel movements. On 21 July 2015 the Department's decision maker decided that the Appellant was not entitled to ESA as she did not have limited capability for work (p.68). As a result, the earlier decision of 8 August 2014 awarding benefit was changed (or "superseded"). The Appellant was now said to be not entitled to ESA for the period from 21 July 2015.

6. On 29 September 2016 another DWP decision maker disallowed a repeat claim for ESA (p.73). This decision was made on the basis that the Appellant's health conditions had not significantly worsened nor was she suffering from a new condition. This decision took effect from 7 September 2016. This was the decision now under further appeal, following an unsuccessful application for mandatory reconsideration (p.84). In her notice of appeal, in response to the question "Do you have any special needs?", the Appellant wrote as follows:

> "Yes – I find discussing my medical issues very distressing/embarrassing. I therefore request all-female Tribunal panel + female clerk + female presenting officer (this request has already been granted for my upcoming PIP appeal)."

7. The Appellant's request for an all-female First-tier Tribunal panel for the oral hearing of her ESA appeal was refused by the District Tribunal Judge, and indeed the direction for an all-female PIP tribunal was set aside (see pp.94-103). On 26 April 2018 the case was listed for oral hearing before the Tribunal in Birmingham. The Tribunal waited for half an hour past the allotted time but then decided to proceed in the Appellant's absence. It dismissed the appeal (p.105), subsequently providing detailed reasons (see pp.107-111). The Appellant then appealed to the Upper Tribunal. The District Tribunal Judge refused to admit what was by then a late application for permission to appeal (pp.114-115).

The proceedings before the Upper Tribunal

8. Upper Tribunal Judge Poynter later both admitted the Appellant's application for permission to appeal and gave permission to appeal. He did so principally for two reasons, which related to (1) the refusal to direct an all-female tribunal panel; and (2) the First-tier Tribunal's decision to proceed in the Appellant's absence. I will take those in reverse order, as Ms Stacey Kiley, the Secretary of State's representative in these proceedings, supports the appeal to the Upper Tribunal on the former ground but not the latter. On that basis Ms Kiley invites me to allow the appeal, to set aside the First-tier Tribunal's decision and to direct a re-hearing of the original appeal.

9. To cut a long story short, I agree with both the Appellant and Ms Kiley that the Tribunal's decision involves an error of law for the second reason outlined above, being the first to be discussed below (namely the decision to proceed in the Appellant's absence). I therefore allow the appeal and set aside the Tribunal's decision. In those circumstances I do not need finally to determine the other ground of appeal relating to the panel composition.

The First-tier Tribunal's decision to proceed in the Appellant's absence

10. Judge Poynter made the following observations when giving permission to appeal:

> "19. More generally, I am concerned that the Tribunal decided to proceed in [the Appellant's] absence when it had very little idea about what [her] case was.
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> 20. This was because the Department had mislaid [the Appellant's] replies to the *Limited Capability for Work Questionnaire* (Form ESA50): see paragraph 3 of page 7 of the Secretary of State's printed response to the appeal to the First-tier Tribunal. The only documents before the Tribunal that emanated from [the Appellant] were the Notice of Appeal, the request for mandatory reconsideration, her annotations on the "Fit Notes" issued by her GP, and her application to set aside [the District Tribunal Judge's] direction that the appeal should proceed before a tribunal with a single female member; and an unsuccessful application for an adjournment.
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> 21. Although the first of those documents described her problems with defecation in graphic terms, none of them included any details about which descriptors she claimed to satisfy.
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> 22. The aspect of the case that concerns me most is that *nothing in the papers suggests that [the Appellant] realised that was the case*. The absence of the Form ESA50 is mentioned in the response but is not highlighted as a potential problem. On the contrary, the information is accompanied by apparently reassuring words about the health care professional having seen it.
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> 23. The Secretary of State was, of course, entitled to make that point. Nevertheless, it may have contributed to a state of affairs in which [the Appellant] apparently failed to appreciate that, if she did not attend the hearing, the Tribunal would not have any evidence from her that directly addressed the issues it had to decide.
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> 24. In my provisional judgment, what fairness required—at least once [the Appellant's] concerns about the composition of the Tribunal and wish for an adjournment raised the possibility that she might not attend any hearing—was

> that the Tribunal should have brought that state of affairs directly to her attention.
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> 25. Ideally, that should have been done during pre-hearing case management.
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> 26. But, as it had not been, it is—putting it at its lowest—arguable with realistic prospects of success that the Tribunal on 26 April 2018 should not have proceeded in [the Appellant's] absence but should instead have given directions explaining that, in the absence of the Form ESA50, if she was not prepared to attend a hearing, the Tribunal would inevitably have to make a decision without knowing her side of the case."

11. Ms Kiley supports this ground of appeal, making the following observations: (i) the Appellant had requested an oral hearing, indicating she wished to participate in person and provide oral evidence; (ii) the Tribunal went some way to addressing the requirements of rule 31 (and especially rule 31(a)); (iii) however, it had failed properly to address rule 31(b) (the 'interests of justice' test), in particular in misdirecting itself as to the Appellant's willingness (or otherwise) to consent to the disclosure of her medical records. In those circumstances, Ms Kiley agrees that it was not in the interests of justice to proceed without giving proper consideration to adjourning either for additional documentary evidence or to allow the Appellant to attend to give oral evidence.

12. The appeal to the Upper Tribunal accordingly succeeds by consent on this point.

The First-tier Tribunal's refusal to direct an all-female tribunal panel

13. Judge Poynter made the following further observations on the other ground when giving permission to appeal:

> "14. The FTT Rules do not give the parties the right to require an all-female (or all-male) tribunal. They do not even—as was formerly the case—give an appellant the right to have even a single member of the same sex on the Tribunal.
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> 15. However:
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> (a) Rule 2(2)(c) of the FTT Rules requires the Tribunal, as part of the overriding objective of dealing with the case fairly and justly to ensure "so far as practicable, that the parties are able to participate fully in the proceedings"; and
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> (b) Even before the requirements of fairness and justice were codified in rule 2(2)(c), Mr Commissioner Bano (as he then was) had decided in *CIB/2620/2000* … that fairness will sometimes require the tribunal to include a person of the same sex as the appellant.
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> In my provisional judgment, it therefore cannot be ruled out that there may be exceptional cases in which fairness requires that *every* member of the tribunal is of the same sex.
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> 16. Whether or not this is such a case, is a matter that I will have to decide. [The District Tribunal Judge] was in a position to know about the available judicial resources and the likely delay that would be caused by directing an all-female

> tribunal. And the qualification "so far as practicable" in rule 2(2)(c) meant that those were factors that she was entitled to take into consideration.
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> 17. On the other hand, [the District Tribunal Judge's] concern for the other (male) appellants who would have to appear before the same tribunal during the rest of the day seems less persuasive. And was her conclusion that "[the Appellant] would be able to properly present her case if at least one of the Tribunal members is female" **[94]** sound, given that [the Appellant] had "declined to go any deeper into her menstrual problems" with the *female* health care professional "as the assessment was being recorded and she felt embarrassed" **[12]**?
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> 18. Further, did the decision not to direct an all-female tribunal adequately take into account the fact that the Form ESA50 was missing? For the reasons given [above at paras 19-26], was it not particularly important that every effort should be made to enable [the Appellant] to participate in the hearing, given that—if she did not do so—the Tribunal would effectively be deprived of her evidence?"

14. In her written submission on behalf of the Secretary of State, Ms Kiley agrees that, as Judge Poynter put it, it "cannot be ruled out that there may be exceptional cases in which fairness requires that *every* member of the tribunal is of the same sex". However, Ms Kiley contends this is not such a case, not least as many appellants will in any event feel embarrassed to talk about very personal medical matters to a panel of strangers.

15. Mr Commissioner Bano's decision in CIB/2620/2000 was considered by Upper Tribunal Judge Williams in CIB/2811/2008, a case heard at first instance by an all-male panel where one of the female claimant's medical conditions was endometriosis. Judge Williams explained the background as follows:

> "10. When I first considered the case I suggested that this was a case where it would have been fair for the appellant to be seen by a tribunal involving at least one female member. It was therefore fair to allow the appeal. This was in part because of Mrs Ps' more general comments about her fear of doctors and in part because the record showed that the approved doctor was male and so were both members of the tribunal. Further, the tribunal appeared not to have considered this issue. This was despite the fact that the main operative assessment of the approved doctor was that the appellant's problems were directly or indirectly all caused by her endometriosis, a female-only medical condition.
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> 11. The Secretary of State's representative objected to my suggestion that the appeal should be allowed on that ground. That submission contains a number of points about the record, including the assertions that she did not ask for a female doctor of member of the tribunal and that her own doctors were not female.
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> 12. I need deal only with two of the points made for the Secretary of State. It is stated for the Secretary of State that the appellant should have asked for a gender specific member or members of the tribunal when returning the standard form TAS 1. The question to which reference is made is question 8: "Use this box to tell us about any other special arrangement you need. For example, special travelling arrangements or wheelchair ramps." I do not accept that an unrepresented individual can reasonably be expected to interpret that as raising

> the issue of gender specific tribunal membership. Nor do I accept that her failure to fill in the form in this way or otherwise directly ask for a female member of the tribunal are by themselves decisive of the issue. The other point is that I now know, although clearly the Secretary of State's representative did not, that the general practitioner who has now offered evidence for Mrs P is female.
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> 13. The appellant, having read the submissions for the Secretary of State, asked for a tribunal with a female member."

16. There are, therefore, a couple of differences with the circumstances of the present case. First, the Appellant in the present appeal, despite being unrepresented, did expressly raise the issue of the panel composition. Second, the claimant in CIB/2811/2008 asked for a female member on the tribunal, not for an all-female panel.

17. Judge Williams then turned to discuss the legal issues raised:

> "14. My jurisdiction is limited to questions of law only. I cannot take into account matters now placed on the record by Mrs P or her general practitioner when they should have been raised with the tribunal. I must judge the fairness of the procedure by the issue as it confronted the tribunal. Should it have considered whether it should adjourn to ensure a female member, and/or further medical evidence before proceeding? More to the point here, should it do so of its own volition when dealing with an unrepresented female appellant raising issues caused by an exclusively female medical complaint in a situation where she gave evidence of her fear of doctors and had put expressly in issue the adequacy of the report by the approved doctor?
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> 15. The issue of the gender of tribunal members was discussed at length by Commissioner Bano in CIB 2620 2000. That was a case of a female suffering from dysmenorrhoea. A strong challenge was put forward against the decision of an all-male tribunal about her problems. That case was heard not long after the relevant provisions of section 41 of the Social Security Administration Act 1992 had been replaced by the Social Security Act 1998 and regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Section 41(6) of the 1992 Act had required that "If practicable, at least one of the members of the appeal tribunal hearing a case shall be of the same sex as the claimant". The constitution of a tribunal was regulated after 1999 not by that provision but by regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. That contained no equivalent provision to that of section 41(6).
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> 16. After hearing full argument, including argument about the requirements of fairness arising from the European Convention of Human Rights, Commissioner Bano took the view that there would still be exceptional cases where the absence of a tribunal member of the same sex might affect the fairness of the case. He took the view that this partly depended on whether the appellant asked for that to happen. Where there was no such request:
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> > 'a tribunal will nevertheless be under a duty to raise the matter of its own motion if there is a genuine reason to believe that in the circumstances of the particular case the absence of such a member may lead to injustice'.
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> I respectfully follow that as continuing to be a valid statement of the approach to be taken by an investigative tribunal."

18. Judge Williams allowed the claimant's appeal in CIB/2811/2008 on other grounds, but indicated that the issue of panel composition was "relevant to this case alongside other aspects of the case, given the nature of the medical problems and that the appellant was unrepresented" (at paragraph 17). In Commissioner Bano's case, CIB/2620/2000, a challenge to the fairness of the proceedings was unsuccessful on the facts (the HCP report was undisputed and the tribunal did not need to investigate any further the effect on the claimant of that condition).

19. Panel composition is now governed by the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835) and the Senior President's Practice Statement on the *Composition of tribunals in social security and child support cases in the Social Entitlement Chamber on or after August 1, 2013*. Neither the Order nor the Practice Statement has anything to say either way about the gender composition of tribunals.

20. The decisions in CIB/2620/2000 and CIB/2811/2008 are plainly authority for the proposition that, even in the absence of a request for at least one member of the panel to be the same gender as the claimant, "a tribunal will nevertheless be under a duty to raise the matter of its own motion if there is a genuine reason to believe that in the circumstances of the particular case the absence of such a member may lead to injustice".

21. Although the point need not be resolved definitively in the context of the present appeal, I agree with Judge Poynter provisional conclusion it "cannot be ruled out that there may be exceptional cases in which fairness requires that *every* member of the tribunal is of the same sex" – and indeed that the clerk and any presenting officer be female as well.

22. I feel compelled to say that several of the reasons advanced in the present appeal for resisting the Appellant's request for an all-female panel were not desperately persuasive. I agree with Judge Poynter that the District Tribunal Judge's concern that such a panel "may adversely affect male appellants" who had their appeals listed before the same all-female panel was unconvincing. Likewise, Ms Kiley's concern that panel members should have equal opportunities to sit, regardless of gender, seems misplaced. As the Appellant rightly observes, there are plenty of opportunities for judges and members of any gender to sit on ESA and PIP appeals. Moreover, the fact that many appellants feel embarrassed to discuss personal matters in front of strangers is neither here nor there if in given circumstances a female claimant may be seriously distressed by doing so in front of an all-male panel. However, other more practical considerations may possibly carry more weight (e.g. the issue of the availability of judges and members and the question of delay, which will always be context specific).

23. In practice, cases in which an all-female panel (and possibly an all-female hearing room environment) may be sought, or where such composition should be considered by the tribunal of its own initiative, are likely to fall into two categories of case – first, appeals involving sensitive and uniquely female medical conditions and, secondly, cases raising cultural issues about the giving of evidence (on which see the guidance of another Chamber of the Upper Tribunal in *AAN (Veil) Afghanistan* [2014] UKUT 102 (IAC)). The common thread is that such questions must be judged by applying the overriding objective as set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. The weight to be

attached to the factors identified there (and other relevant factors not captured in the statutory formulation) will vary from case to case.

24. In carrying out that exercise, it is not helpful for those involved in the judicial process to characterise a request for an all-female panel in terms of it being an attempt by the claimant to "choose their own tribunal". Rather, the question is whether such a solution is fair and just and ensures "so far as is practicable, that the parties are able to participate fully in the proceedings" (rule 2(2)(c)), bearing in mind also the other considerations in rule 2.

What happens next: the new First-tier Tribunal

25. There will need to be a fresh hearing of the original appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the Appellant qualified for ESA at the material time. That is a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact about the circumstances as they were at the date of the decision under appeal (29 September 2016).

26. In her reply to the Secretary of State's response, the Appellant has given a perfectly reasonable explanation as to why she does not want her re-hearing dealt with at the Plymouth tribunal venue (the nearest to her home). Accordingly, I direct the re-hearing should be in the South West region but not at Plymouth (e.g. at Exeter or Truro).

27. The Appellant also indicates that she would rather avoid the stress of a further ESA tribunal hearing and so requests for her re-heard appeal to be considered "on the papers". If so, the request for an all-female tribunal panel necessarily rather falls away (although the case for at least one female member of the new First-tier Tribunal remains compelling). Experience shows that appellants who attend oral hearings of their appeal tend to fare rather better than those whose appeals are decided on the papers. The Appellant is therefore asked to confirm that it is indeed her wish for a hearing on the papers, as this may affect the District Tribunal Judge's directions as to the composition of the new tribunal.

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)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 9 January 2020

Nicholas Wikeley
Judge of the Upper Tribunal