IN THE UPPER TRIBUNAL **Appeal No: CPIP/2152/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Newcastle-Upon-Tyne on 30 May 2019 under reference SC228/18/01629 involved an error on a material point of law and is set aside.

The Upper Tribunal is not able to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions given by the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing shall be at an oral hearing.

(2) Both the appellant and a presenting officer for the Secretary of State should attend the hearing. In the present Covoid-19 emergency it may be that such a hearing will need to be conducted by telephone or by video conferencing (e.g. Skype).

(3) The appellant is reminded that the tribunal can only deal with her situation as it was on or before 18 June 2018 and not any changes after that date.

REASONS FOR DECISION

1. This appeal to the Upper Tribunal is supported in part by the Secretary of State. It arises from a supersession decision made by the Secretary of State on 18 June 2018 which changed with effect from that date the level of the appellant's entitlement to the Personal Independence Payment (PIP). Prior to this, by a decision dated 15 March 2016, the appellant had been awarded the enhanced rate of both components of PIP from 13 April 2016 to 28 February 2019. This award arose on the appellant's prior award of DLA being converted to PIP. However, the supersession decision of 18 June 2018 replaced the prior PIP award with an award of the standard rate of both components of PIP from 18 June 2018 to 14 May 2021.

2. The appellant's grounds of appeal against this PIP supersession decision were quite specific. They were as follows.

> "I would like to appeal the decision to award only the standard rate of the Daily Living component of PIP. I do not believe this decision reflects my health problems and day to day difficulties. I have had carpal tunnel surgery on both hands and still have ongoing problems. I also have heart problems, arthritis in both hands and knees and fibromyalgia. I take daily medication for all these conditions including morphine. I was awarded points for the following descriptors: dressing and undressing, preparing food, washing + bathing and managing toilet needs. I believe that the following descriptors should have also been awarded: taking nutrition and managing treatments and also additional points for preparing food and washing + bathing.
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> I was also awarded standard mobility but believe that the award should have been enhanced. I require physical support and am unable to manage to mobilise more than 10 metres."

3. The First-tier Tribunal, in the form of a District Tribunal Judge (who in fact presided on the First-tier Tribunal that decided the appeal), gave directions on the appeal on 23 May 2019, a week before it was heard. Amongst other things, the directions said the following:

"**DIRECTIONS to [the appellant]**

WHAT THE TRIBUNAL WILL CONSIDER
If a descriptor is disputed the Tribunal has to consider all the facts and consider whether it applies. Points in a scoring descriptor are not and cannot be "banked" if that descriptor is disputed. The Tribunal is required to look afresh at that descriptor.

Your appeal disputes the decision. Consequently, this means you are challenging any descriptors awarded. The Tribunal will have to decide which if any of the descriptors apply.

You have asked to be awarded PIP at the enhanced rate. In order to do this the Tribunal may have to consider which descriptors apply. This might mean the standard rate of the award no longer applies.

Information may come to light during the appeal process to suggest a different decision should be made or different descriptors awarded. The outcome may be more or less favourable than the decision being challenged.

The function of the Tribunal is to decide what, if any, entitlement there is to the benefit. This may result in different descriptors being awarded. The effect of this might be might be the award is the same, increased, reduced or removed altogether.

It is possible to withdraw the appeal. If an appeal is withdrawn the appeal ends.

For more details on the powers of the Tribunal and how to prepare for an appeal please read the following which is freely and easily available **"*how to appeal against a decision made by the Department for Work and Pensions*" document SSCS1A available from** [and a website address was given]

DIRECTIONS To The Secretary of State

1. The Tribunal directs Secretary of State must attend the hearing and be in a position to deal with all relevant issues and provide the Tribunal with information it needs….."

4. I consider it appropriate to make some observations about these directions at this stage. It is welcome that the First-tier Tribunal seeks to provide those appearing before it – particularly those who are inexperienced and representing themselves – with useful information about the appeal process. However, describing what the First-tier Tribunal's powers and duties may be on appeal is different from the actual exercise of those powers. Moreover, the powers must be exercised by all the members of the First-tier Tribunal convened to

decide the appeal and that exercise should arise on the facts of the individual case before it. Further, some of the information set out in the above direction is, with respect, confusing because it mixes up what the First-tier Tribunal says it is required to do ("will have to") with where it may only have a power to take certain steps ("may have to"), without clearly demarcating the two.

5. In addition, the appellant was not disputing the descriptors she had been found to satisfy for dressing and undressing and 'toileting', so on the face of the first paragraph of the directions the appellant may have assumed these were not going to be in issue on the appeal and were 'banked', though she may then have struggled (as I have done) with how that paragraph fits with the second paragraph in the directions. (I would add that the "points cannot be 'banked'" view expressed in the directions (and even more emphatically in the statement of reasons set out below) needs to be read with decisions *EG v SSWP* (PIP) [2015] UKUT 275 (AAC) and *LJ v SSWP* (PIP) [2017] UKUT 455.)

6. The appeal was heard a week later. The Decision Notice said:

> "1. The appeal is refused.
> 2. The decision by the Secretary of State on 18/06/2018 in respect of the Personal Independence Payment is confirmed.
> 3. [The appellant] is not entitled to any rate of the daily living component from 18/06/18. She scores 0 points. This is insufficient to meet the threshold for the test.
> 4. [The appellant] is not entitled to any rate of the mobility component from 18/06/18. She scores 0 points. This is insufficient to meet the threshold for the test."

7. The First-tier Tribunal was asked by the appellant for a statement of reasons for its decision, which it provided. I highlight the following excerpts from those reasons as they relate to the grounds of appeal on which this appeal turns.

> "27. The appeal very clearly puts in issue the decision made by the Secretary of State.
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> 28. [The appellant] states the decision did not reflect the extent of her problems. She also questioned numerous descriptors.
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> 29. This therefore means the issue before the Tribunal became the question as to whether she was entitled to PIP. The claim the decision does not reflect the level of her problems means it affects everything. Consequently, [the appellant's] own appeal forced the Tribunal to look afresh again at the decision made. This means all descriptors were in issue. Points are not and cannot be "banked". An appeal to a Tribunal is by way of rehearing. The function of the Tribunal is to determine the level of benefit an individual is entitled to on the basis of the evidence…….
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> 31. Page J, conclusion of the appeal papers sets out what the powers of the Tribunal are. The first paragraph tells [the appellant] the Tribunal has the power to increase or decrease the rate or period of the award. It may consider all aspects of the benefit, not just the descriptors under appeal. As such, the Tribunal can consider which descriptor applies for each activity and any changes may then increase, reduce or maintain the award.
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> 32. The appeal papers therefore clearly set out what the powers of the Tribunal are. She is put on notice as to what the Tribunal can do when it hears an appeal……..She was therefore put on notice from the outset what the powers of the Tribunal are and the risks associated with an appeal.
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> 33. Further, directions were issued on 24 May 2019. This further explains what the powers of the Tribunal are and what issues it would be considering.
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> 34. [The appellant] confirmed she had received the directions notice. She confirmed she understood them and had read them. [She] understood the risks associated with proceeding. She was aware of the right to withdraw. The Tribunal reminded [the appellant] of the powers of the Tribunal and the ability to withdraw. [She] was adamant she wanted to proceed……..
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> 38. The Secretary of State was not present at the hearing. The Secretary of State made a decision not to attend. It was therefore not in the interests of justice to adjourn to enable the Secretary of State another opportunity to attend. The Tribunal therefore proceeded in the absence of the Secretary of State….."

8. Although the First-tier Tribunal refused to admit the application for permission to appeal made to it because it was nearly four weeks late, I considered that the reasons for the delay in applying to the First-tier Tribunal and the potential grounds of appeal meant that the interests

of justice should lead to the application for permission to appeal being admitted, and I gave the appellant permission to appeal. I did so on four grounds, as follows.

> "2. The first ground of appeal is that the decision notice contradicts the statement of reasons and wrongly states that the First-tier Tribunal confirmed the Secretary of State's decision of 18 June 2018 when in fact it must have set that decision aside in order to have arrived at a different, and less favourable decision, than the one under appeal. Such a contradiction may arguably amount to an error of law.
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> 3. The second ground of appeal coincides with one advanced by [the appellant] and concerns the First-tier Tribunal proceeding in the absence of the Secretary of State's representative whom it had directed must attend (see the 23 May 2019 directions of DTJ Moss at page 151). The First-tier Tribunal that decided the appeal on 30 May 2019 included DTJ Moss. In terms of the Secretary of State, the tribunal proceeded (see paragraph 38 of its reasons) on the basis that the Secretary of State's representative had *chosen* not to attend the hearing. In so doing the tribunal arguably materially misdirected itself because attendance at the hearing was not a matter for the respondent to decide or choose upon: the effect of the 23 May 2019 directions, unless and until set side, was that she was under a legal requirement to attend. Moreover, nothing in the papers indicates that this direction requiring the Secretary of State's attendance had been set aside either before or at the hearing on 30 May 2019. Nor on the face of it did the First-tier Tribunal 'waive' the requirement to attend it had imposed on the Secretary of State under its direction of 23 May 2019. The power of waiver is found in rule 7(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. It is to be exercised when it is "just" to do so. Given the 'overriding objective' found in rule 2 of the same Procedure Rules, it is arguable that if waiver of the direction requiring the Secretary of State's representative to attend was being considered by the tribunal, the views of [the appellant] ought to have been sought before any waiver decision was made, but there is nothing to indicate that this occurred. This arguably may have been even more important in a case where the First-tier Tribunal was contemplating considering making an award which was less favourable to [the appellant] than the one the Secretary of State had made to her.
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> 4. The third ground of appeal is that I consider it is arguable that the First-tier Tribunal have failed to provide an adequate explanation for why entitlement to the standard rate of both components were issues arising on the appeal. Looking at the appellant's letter of appeal (page 5), on the face of it she did not put in issue the daily living descriptors she had been awarded for dressing and undressing and managing toilet needs. On this basis it is arguably difficult to identify the basis on which the tribunal concluded these two daily living activities and the descriptors under them were issues arising on the appeal. The tribunal was arguably wrong, therefore, to state that the

> appeal by [the appellant] "meant all descriptors were in issue. And if this is found to be the case, it was also wrong for DTJ Moss to state in the directions of 23 May 2019 that because [the appellant] was challenging the decision she was challenging *any* descriptor awarded. Challenging the decision is a necessary step for the appeal to arise in the first place, but it does not put in issue every and any conceivable issue connected with entitlement to the benefit under appeal. Such an approach would arguably render section 12(8)(a) of the Social Security Act 1998 of having no limiting effect. Further, it is arguable that the appellant was not raising an issue in her appeal form about being able to mobilise *more* than 50 metres and so on its face was not brining into issue on the appeal the standard rate of the mobility component. Such an issue may have arisen once the tribunal began its consideration of the evidence as to the extent of [the appellant's] ability to mobilise, in seeking to identify if she was limited (as she argued in her appeal) in her mobilising to 10 metres or less, but the approach of the tribunal here was apparently to determine that the standard rate of the mobility component was automatically in issue on the appeal because [the appellant] was seeking the enhanced rate of the mobility component. Further, if all the PIP descriptors were not in issue on the appeal, the tribunal arguably failed to explain the basis on which it exercised its discretion so as to bring them into issue on the appeal: see *ET v SSWP* (PIP) [2017] UKUT 478 (AAC).
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> 5. The fourth and final ground of appeal is that the tribunal has arguably erred in law in its approach to the GP's evidence on mobilising. Rather than weighing the GP's evidence as part of the totality of the evidence on mobilising before it and then come to its decision, the tribunal arguably instead has taken its view of the [the appellant's evidence as determinative and then explained the GP's evidenced so as to fit with that view. That arguably is wrong as a matter of approach and is also arguably wrong because it fails to explain why a GP would be providing unreliable evidence. That may be particularly said to be the case given the 'statement of truth' the GP gave at the end of his letter (page 142)."

9. The Secretary of State supports the appeal on grounds one and two above but not ground three or four. I accept on further consideration that ground four is not made out. As Mr Wayne Spencer for the Secretary of State argues, the GP's evidence was not considered in isolation from the totality of the evidence. Such an approach would arguably have been erroneous in law: see *Karanakaran v Home Secretary* [2000] 3 All ER 449 at 477f-h and *DK v SSWP* [2016] CSIH 84; [2017] AACR at paragraphs [12]-[13]. However, I am persuaded by Mr Spencer that on this occasion the First-tier Tribunal considered the GP's evidence against the background of the claimant's own evidence (including the contradictions between her evidence and the evidence of

her GP), the other evidence and taking into account the expert evaluative role of the First-tier Tribunal. I would add to this that the First-tier Tribunal has provided a sufficient explanation for why it concluded that the GP's report was based on what the appellant told him.

10. On ground one, I am satisfied that the First-tier Tribunal erred in law. The decision notice said that the tribunal confirmed the Secretary of State's decision under appeal. That was wrong. Had the tribunal confirmed the decision under appeal it would have left in place the award of the standard rate of both components of PIP. Removing any award of PIP, as the tribunal did, was giving a different decision to the decision under appeal and was plainly inconsistent with affirming that decision. No steps have been taken by the First-tier Tribunal to correct the decision notice.

11. As Upper Tribunal Judge Jacobs stressed in paragraph [9] of *SSWP v JL* [2018] UKUT 291 (AAC), it is essential that the decision notice is legally coherent. If it is self-contradictory it is not. This is because, per paragraph [15] of *R(IB)2/04*, it is the decision notice which fixes the legal position as to entitlement to the benefit between the parties to the appeal. On the face of the decision notice in this appeal the Secretary of State could not have known what she was to implement in terms of entitlement to benefit following the appeal. The appellant likewise could not have known what her entitlement was to PIP following her appeal. Such a fundamental incoherence in the First-tier Tribunal's (uncorrected) decision must render it erroneous in law.

12. Ground two on the appeal is also made out, largely for the reasons I gave when giving permission to appeal. As I have set out above, a presenting officer for the Secretary of State had been directed to attend. That official had not been given an option to attend or not, they had been required by the First-tier Tribunal to attend and ought to have complied with the legal requirement imposed upon them. The

presenting officer's *failure* to attend was a matter the First-tier Tribunal could have taken into account by, for example, waiving the requirement or requiring it to be met. But by proceeding on the basis that it was open to that official to choose whether to attend or not, the First-tier Tribunal misdirected itself and thereby erred in law.

13. This is not an empty or technical ground of appeal. As I pointed out in giving permission to appeal, had the tribunal properly directed itself it could have waived the requirement for attendance by a presenting officer under rule 7(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the TPR"). However, the exercise of that waiver power ought to have involved the First-tier Tribunal in seeking the views of at least the appellant (as she was at the hearing) under rule 2(3)(a) and 2(2)(c) of the TPR, which it did not do. That itself was wrong in law. See further and to the same effect: *MT v SSWP* (IS) [2010] UKUT 382 (AAC) and *TJ v SSWP* (ESA) [2014] UKUT 445 (AAC) (at paragraphs [12]-[16]). Seeking the appellant's views may have been particularly important in this appeal given the possibility of the tribunal rejecting both the appellant's and the Secretary of State's cases on the appeal before it.

14. The Secretary of State opposes the appeal being allowed on ground three (whether the standard rate of both components of PIP were issues arising on the appeal) as well. She argues that the decision under appeal was a supersession conducted under regulation 26(1)(a) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance) (Decisions and Appeals) Regulations 2013. In consequence, it is argued, the Secretary of State was entitled to reconsider the appellant's entitlement to PIP in the light of all the relevant evidence: per *KB v SSWP* (PIP) [2016] UKUT 537 at paragraphs [12], [13] and [18]. And so doing, she reduced the rate of both components from the enhanced to the standard rates. I do not disagree with any of this analysis. However, it is an analysis which only relates to the powers of the Secretary of State as decision maker under section 11 of the Social Security Act 1998 and says nothing

directly about the First-tier Tribunal's duties and powers in deciding an appeal under section 12 of the Social Security Act 1998.

15. On the issue of the tribunal's powers the Secretary of State argues, following on from the above analysis about the exercise of her section 11 powers, as follows:

> "In order to decide whether [the Secretary of State's supersession decision reducing the rate of both components of PIP to the standard rate] should stand or fall, the tribunal had to determine what it considered the correct rate of both components to be, given the body of evidence now before it. Having concluded that there was no entitlement to either component, the tribunal had no choice but to give a decision to that effect. Anything else (such as leaving undisturbed an award that its findings did not support) would have been futile, incoherent and self-contradictory."

16. This analysis in my judgment is misconceived and wrong as it ignores entirely the terms of section 12(8)(a) of the Social Security Act 1998. The Secretary of State's view might have been correct if the law required the First-tier Tribunal to decide all and any issues going to entitlement that arise on the evidence. But that is not the law. Under section 12(8)(a) – which provides that the First-tier Tribunal "need not consider an issue that is not raised by the appeal" – the tribunal is only required to decide the issues that are raised by the appeal and has a discretionary power to consider other issues. However, that power must be exercised consciously and reasons given to explain why it has been exercised: per *R(IB)2/04* at paragraph [94]. See further the analyses in *EG v SSWP* (PIP) [2015] UKUT 275 (AAC) at paragraphs [7]-[9] and *ET v SSWP* (PIP) [2017] UKUT 478 (AAC).

17. For the reasons I gave when I gave permission to appeal, reasoning which admittedly neither party has engaged with in substance and thus I somewhat reluctant to expand upon, I am satisfied that the First-tier Tribunal also erred in law on the third ground of appeal. Without repeating that reasoning completely, in my judgment the reasoning of the First-tier Tribunal was not adequate to explain either (a) why entitlement to the standard rate of both components of PIP was an

issue that arose on the appeal at the outset of the hearing of the appeal or, (b) if it was not an issue that so arose, why the First-tier Tribunal was exercising its discretion (at the outset of the hearing) to bring entitlement to the standard rate of the PIP components into issue on the appeal.

18. By her careful and precise appeal grounds I cannot, for example, see how the appellant's entitlement to the daily living descriptors she had been found by the Secretary of State to meet under dressing and undressing and 'toileting' were issues the appellant raised on her appeal. On the face of her appeal grounds the appellant was content with the descriptors found met under these two daily living activities and was not raising any issue about them on her appeal. Nor did the Secretary of State raise any issue about these descriptors: at the end of her appeal response the Secretary of State asked the First-tier Tribunal to confirm her supersession decision, which decision was founded in part on those two scoring descriptors.

19. Further, in so far as I have understood it correctly, I do not accept the tribunal's analysis that merely by challenging on the appeal the supersession decision of the Secretary of State of 18 June 2018, the appellant was putting in issue all and every aspect of her entitlement to PIP. That analysis has the same flaws as the Secretary of State's argument rejected in paragraph 14 above. I simply do not see how the carefully crafted grounds of the appellant's appeal "forced the Tribunal to look afresh at the decision made" such that all descriptors were in issue merely as a consequence of the appeal having been made. The language of 'forced' indicates the First-tier Tribunal considered that from the outset (i.e. before any oral evidence had been taken) that the issue arising on the appeal was whether the appellant was entitled to any rate of either component of PIP and so the First-tier Tribunal was, per section 12(8)(a), required to address that issue. Given the limited matters put in issue by the letter of appeal, I fail to follow why entitlement to PIP as a whole was in issue on the appeal. I accept that

an issue may arise on the appeal otherwise than by the terms of the appeal letter, but that was not the analysis deployed by the tribunal in this case.

20. Nor do I consider anything decided in *LJ v SSWP* (PIP) [2017] ULKUT 455 stands against the view I am taking in this decision (see paragraphs [8]-[9] of *LJ* in particular). *LJ* in any event was concerned with an appeal against a decision that there was no entitlement to any rate of either component of PIP. In this appeal one way of identifying the issue on the appeal was whether on all the evidence the Secretary of State had been correct to reduce the PIP award from the enhanced rate of both components to the standard rate, which does not obviously give rise to an issue of whether even the standard rate was justified.

21. Where an issue is raised on an appeal about *the extent to which* a PIP activity might apply, that *may* bring into issue through the evidence (both documentary and oral) whether a descriptor already awarded was correctly awarded. However, again, that was not the First-tier Tribunal's approach here. Furthermore, and as I have already said, on the terms of the appeal letter, where no challenge was made to the descriptors found met by the Secretary of State in respect of dressing and undressing and 'toileting', I cannot see the rational basis for contending, as the First-tier Tribunal did, that those descriptors were automatically in issue on the appeal from its outset.

22. There is potentially another troubling aspect about the First-tier Tribunal's approach, though in fairness this is not a matter I have raised previously and so I mention it here only because it may assist the new First-tier Tribunal when it comes to redecide the appeal. The parties should feel free to make argument on this point before the First-tier Tribunal if they wish. The point concerns whether the appellant was given adequate notice that issues neither she nor the Secretary of State had in any obvious sense put in issue on the appeal (i.e. whether she was entitled even to the standard rate of either component of PIP),

were issues arising on the appeal or, if they were not, the First-tier Tribunal had lawfully exercised its discretion to make them issues on the appeal.

23. It seems to me that determining whether issues other than those the parties considered arose on the appeal were issues on the appeal, or were not in issue on the appeal but were being brought into issue on the appeal by the First-tier Tribunal as matter of its discretion, (which I will identify simply for the purpose of explanation as the 'new issue'), could only be done by the three-person First-tier Tribunal that decided this appeal on 30 May 2019: see *MB and others v SSWP* (ESA and DLA) [2013] ULKUT 111 (AAC); [2014] AACR 1. To that extent at least, the District Tribunal's judge's directions of a week earlier could not determine those matters. It is important to here bear in mind that the focus of section 12(8)(a) of the Social Security Act 1998 is "In deciding an appeal under this section, the First-tier Tribunal need not consider any issue that is not raised by the appeal…." (my underlining added for emphasis.)

24. However, if this is correct, the point made in *BTC –v- SSWP* [2015] UKUT 0155 about the appellant not having had the same advance notice of a 'new' issue at the date of the hearing on 30 May 2019 as the Secretary of State would have been required to give to her under rule 24(2)(e) of the TPR, had the Secretary of State also being taking entitlement to the standard rate of both components of PIP as an issue on the appeal, ought arguably have weighed with the First-tier Tribunal in terms of its consideration of whether the appellant had sufficient and clear notice that other issues were in fact to be considered on her appeal.

25. Given the three errors of law identified in paragraphs 10-20 above, I am satisfied that the First-tier Tribunal erred materially in law in coming to its decision and its decision as a consequence should be set aside.

26. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

27. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether her appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

Dated 26th March 2020
(The above is the date this decision was made. It may however take some time to be issued given the current Covid-19 medical emergency and the temporary closure to the UT(AAC)'s office in London.)