IN THE UPPER TRIBUNAL **Case No** CPIP/1328/2019
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at East London on 8 January 2019 under reference SC124/18/01895 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 21 of the Reasons.

REASONS FOR DECISION

1. This appeal is supported by the respondent on the ground that the First-tier Tribunal ("FtT") erred in law by failing to consider whether the appellant's impairments triggered duties under the Practice Direction "First-tier and Upper Tribunal - Child, Vulnerable Adults and Sensitive Witnesses" ("the Practice Direction") or, if it did consider the point, to say what it made of it. The Practice Direction applies to (among others) "vulnerable adults" (as defined) and by its para 6 requires a tribunal to consider how to facilitate the giving of any evidence by a vulnerable adult.

2. As is not uncommon and often very sensible, the respondent, supporting the appeal on one ground and accepting that the case required to be remitted, has not engaged with the other points on which I gave permission to appeal following an oral hearing, attended by the appellant's representatives only. Some of them raise questions of some practical importance to the presentation of cases where, as here, a claimant is represented by an organisation which has very considerable experience of assisting people with a particular type of disability in different ways, of which providing representation at tribunal level may be but a relatively small part. As I have not heard from the respondent on the point, what follows in paras 18 and 19 of this decision are no more than observations, but I trust no less useful for that.

3. The appellant had previously received the lower rate of the mobility component and the lowest rate of the care component of disability living allowance. When he was required to claim Personal Independence Payment ("PIP") instead, by a decision dated 4 May 2018 he was awarded 0 points for each of the daily living and mobility components. On appeal he was awarded the mobility component at the standard rate from 6 June 2018 to 5 June 2023, achieving 10 points for descriptor 1d. So far as the daily living component was concerned, he scored points for descriptors 1b, 3b and 9b, which amounted to 5 in all, insufficient for an award of that component.

4. In preparing for the FtT hearing, the hearing enquiry form had been returned, completed by Headway East London. The question for "Do you have any special needs?" was ticked with the answer "No".

5. The appellant had previously nominated as his representative Ms Sarah Griffiths, a caseworker, of Headway East London. Subsequently he also gave consent for Mr Ben Mills, also of Headway East London to act "as his representative", indicating that he would like them both to speak on his behalf at the hearing.

6. Headway East London's website states that:

> "Headway East London is a charity supporting people affected by brain injury. Working across 13 London boroughs we offer specialist support and services for over 200 survivors, family, friends and carers in the local area each week
> ...
>
> We provide therapies, advocacy, family support and community support work alongside our day service: a community venue where members can make the most of their abilities and interests. We believe that every one of our members has something to contribute to both Headway East London and the wider community. Our occupational projects include an art studio, writing projects and a professional kitchen where members cook each day for other members, volunteers, staff and visitors.
>
> We also promote awareness and understanding of brain injury by providing information, acting as an educational resource for universities, offering training to professionals and businesses, and running projects engaging our members with the public."

As the case is being remitted to a tribunal which may have to evaluate evidence from Headway East London, I limit myself to saying that nothing in this decision should be taken as reflecting negatively on the services which Headway East London provides, which are clearly of importance to many people.

7. The written submission by the appellant's representative indicated that he had developed a recurrent colloid cyst (a form of brain tumour). It was partially removed in 2005. An attached neuropsychological report from 2007 expressed the view that the appellant had "suffered a severe cognitive impairment secondary to brain damage" and gave details of the respects in which the damage manifested itself. A number of subsequent surgical interventions were required, apparently because of the potential risks attaching to the condition. The cyst was finally removed in January 2017 but there was medical evidence (p15) that the operation was not expected to improve the appellant's memory problems or fatigue or cognitive issues. The

submission further indicated that his cognitive impairments had not improved due to physiological damage caused by the initial emergency surgery.

8. I note, though, that here may have been some degree of variance in the evidence. A further neuropsychological report in 2017, also attached to the submission, comparing with a further test which had been conducted in 2016, noted "surprisingly poor verbal recall memory" and that while visual recall memory had improved there was "marked loss of information following a delay". In summary, "memory functions remain[ed] inefficient notwithstanding some improvement". Performance remained "rather slow on one test sensitive to executive dysfunction" but was adequate on all other tests. Additionally, on a self-reported test for depression, the appellant scored in the moderate range.

9. In the submission Ms Griffiths, as well as introducing and summarising the evidence discussed at [7] and [8] submitted that the appellant displayed anosognosia, that is to say a lack of insight into the condition with which he presents, required support to convey and understand information, including being supported - often by Headway staff -at any important medical appointments, and demonstrated confabulation (false memories). She also drew attention to the fatigue experienced due to the appellant's brain injury, said at times to be so debilitating that he cannot leave the house.

10. The record of proceedings apart from a two-line note that "Headways" referred to the appellant's need for frequent prompting, recorded only oral evidence clearly given by the appellant himself in response to questioning.

11. The FtT appears to have accepted the content of the medical reports regarding "poor short-term memory, difficulties in learning new tasks, reduced concentration, fatigue and difficulties in keeping track of conversations that last longer than 20 minutes or so and that those difficulties were current at the material time. It noted that he "answered all of the questions put to him by the Tribunal without apparent difficulty", was "articulate and required no prompting" and "engaged in a frank, logical and pleasant way with the tribunal". However, when its findings were set against the statutory criteria, he achieved the score set out at [3] above, but no more.

12. The grounds of appeal were wide-ranging, but included that the FtT had failed to take into account the level of support provided to the appellant by Mr Mills in taking decisions about his medical treatment; that the FtT had failed to take into account the appellant's lack of awareness and insight; that the appellant had in fact answered on many occasions by saying that he could not remember and had also demonstrated confabulation; and that a number of these matters had been put to the FtT by the Headway representatives.

13. Matters said to have been put by the Headway representatives largely did not figure in the record of proceedings and I directed that a witness statement be provided setting out what it was claimed had been said. Mr Mills supplied one indicating that whilst he is now employed by Headway East London as

Director of Development he has continued informally to assist survivors of acquired brain injuries, including the appellant, and has advocated for the appellant in various capacities, including at medical appointments, since 2006. Mr Mills has a master's degree in psychology and appears in various forms of the media on topics relating to acquired brain injury. His evidence about what was said at the FtT hearing was that:

> "Ms Griffiths and I sought to explain the impact of [the appellant's] cognitive impairments on his ability to give evidence and in particular his confabulation, anosognosia and fatigue. I do not feel that the Tribunal took account of these factors in their taking of evidence from [the appellant]. Although I sought to represent them it appears they were not recorded. I recall towards the end of the tribunal meeting (*sic*) expressing that I would want the panel to take note of a 20-30% variance in the accuracy of [the appellant's] own report of his difficulties. I made this point in reference to [his] anosognosia and amnesia. I also recall mentioning the impact of [his] depression and anxiety and the interaction between these and his various cognitive impairments – resulting in a fluctuating functional profile and a significantly reduced capacity for problem solving, coping and self-advocacy when his symptoms are at their worst.
>
> I note that the Record of Proceedings …does not refer to any evidence from myself or Ms Griffiths other than [the two-line note referred to at para 10 above].
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> I did not take notes, but my recollection is that the proceedings did not appear to me to include appropriate adjustments for [the appellant's] cognitive impairments and his ability to present his evidence in his best interests".

14. In *RT v SSWP (PIP)* [2019] UKUT 207 (AAC), Upper Tribunal Judge Poynter ruled on the difficult issues of interpretation of the definition of "vulnerable adult" to which the Practice Direction gives rise before turning at paras 81ff to giving practical guidance to the Social Entitlement Chamber, bearing in mind that a very large proportion of claimants appearing before that Chamber would be "vulnerable adults" for the purposes of the Practice Direction. In many cases the normal procedures of the FtT, established and applied with a view to apply the "overriding objective", including that of "ensuring, so far as practical, that the parties are able to participate fully in the proceedings" might prove sufficient and a failure to follow the Practice Direction might not amount to a material error of law, but whether it would do so was fact-specific. Judge Poynter encouraged the FtT to consider as part of its previewing of the case whether special arrangements needed to be adopted to facilitate the giving of evidence. He indicated (para 91) that in circumstances where special arrangements have been put in place – or where there might be doubt as to whether they should have been – if a written statement of reasons is requested, the statement must explain what the tribunal decided about the requirements of the Practice Direction and why.

15. Judge Poynter did also remind representatives of their duties to under rule 2(3) to help the FtT further the overriding objective and to co-operate with the tribunal generally, indicating that:

> "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.
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> 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."

16. The respondent's representative accepts that from the evidence of the consultant neurosurgeon[1] and the evidence of the clinical neuropsychologists appended to, and summarised in, Ms Griffiths' submission to the FtT, and the claimant's description of the effect of his disability in his claim form, the claimant fell within the definition of a "vulnerable adult" for the purposes of the Practice Direction. The respondent's representative submits that there was an absence of evidence to indicate that the tribunal gave consideration to how to facilitate the claimant's giving of evidence and that such constituted a material error of law.

17. As Judge Poynter's decision notes, many claimants in the FtT will be "vulnerable adults" as defined and the present appellant by virtue of his long-running medical issues is far from being an exception. Although the respondent's representative does not elaborate on why the apparent error by the FtT does amount to a material error in this case, I accept that it is so, in particular because the very things which cause the appellant to be a "vulnerable adult" for this purpose are (as is common ground) memory issues, whilst it had been flagged up in written submissions (and so at very least required addressing) that there were also issues of lack of insight and false memory, all of them issues going to the very heart of giving evidence.

18. The respondent has not seen fit to take the point that Headway East London had themselves indicated by the ticked answer on the enquiry form that the appellant had no "special needs". That was an unhelpful response given the contentions now advanced and in a borderline case might have led to a different outcome on this issue, but as Judge Poynter indicated, failure to

[1] Her reference to pp101-103 was intended to refer to the different consultant surgeon's report at p15.

flag up the needs may be a relevant factor, but not determinative. It does not lead me to refuse to accept the respondent's support for the appeal on this ground. Nonetheless, there is a learning point there.

19. I would suggest there is a second learning point and one which may be relevant to other not for profit organisations who provide some form of personal support to their service users. Both Mr Mills and Ms Griffiths had been put forward as the appellant's "representatives" in the FtT proceedings. Whilst the principle is applied flexibly in the Social Entitlement Chamber, there is still a difference in principle between appearing as a representative and as a witness. Proceeding on the assumption of the accuracy of Mr Mills' witness statement, the apparent failure by the FtT to record more of his comments than it did is at least potentially explicable to a degree by the FtT's failure to appreciate – in part because it had not been adequately flagged up to it – that Mr Mills, with substantial experience and qualifications in the field and lengthy personal acquaintance with the appellant, was looking to give evidence himself and not merely to provide submissions on evidence that was otherwise before the FtT. If this had been made clearer at the outset by Headway East London, it is possible that these apparent difficulties might not have arisen.

20. The FtT's task was therefore a difficult one and any implicit criticism of their decision which the present decision may entail is distinctly muted. Nonetheless, the FtT's decision was in error of law for the reason given and the case must be remitted.

21. I direct therefore that:

a) the question of the appellant's entitlement to PIP is to be looked at by way of a complete re-hearing in accordance with the legislation and this decision;

b) within 21 days of the date of the letter issuing this decision, the appellant's representative must write to the FtT setting out, consistently with para 94 of *RT*, particulars of any special arrangements which they consider may be required to facilitate the giving of the appellant's evidence or, if none, saying so;

c) unless otherwise directed, the appellant or his representative must ensure that any further written evidence is filed with the FtT no less than 21 days before the hearing date;

d) the tribunal will need to make full findings of fact on all points that are put at issue by the appeal;

e) if the tribunal rejects the claimant's evidence, it must provide a sufficient explanation why it has done so and must give adequate reasons for its conclusions;

f) the tribunal must not take account of circumstances that were not obtaining at the time of the decision under appeal, which was taken on 4 May 2018 - see section 12(8)(b) of the Social Security Act 1998 - but may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: R (DLA) 2/01 and 3/01.

22. The decision on the re-hearing is a matter for the First-tier Tribunal and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

CG Ward
Judge of the Upper Tribunal
14 January 2020