ON APPEAL FROM:

Tribunal:	First-tier Tribunal (Social Security and Child Support)
Tribunal Case No:	SC 156/16/01427
Tribunal Venue:	Port Talbot
Hearing date:	8 November 2016

IN THE UPPER TRIBUNAL **Case No.** CPIP/1035/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal, sitting at Port Talbot on 8 November 2016 (ref: *SC 156/16/01427*), involved an error on a point of law. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I set aside the tribunal's decision and remit Miss I's appeal against the Secretary of State's decision as to her PIP entitlement to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

REASONS FOR DECISION

Putting this decision in context

1. If a claimant's professional representative makes factual assertions, especially in writing, the First-tier Tribunal cannot be expectedly routinely to pause and ask whether the assertions are really those of the claimant. But what if the representative's conduct of a mentally ill claimant's appeal included actions such as these:

- arguing in writing that "I cannot believe that the decision maker could be this thick" and should be subject to a "full police criminal investigation", in a submission to the tribunal;

- arguing that a Healthcare Professional's opinions could only be explained by childishness or incompetence and that a criminal investigation was called for here too;

- 10 days before a hearing, emailing an NHS specialist doctor to insist on a "full and comprehensive report" before informing the doctor that the claimant was a victim of a private company paid bonusses to remove people's disability benefits;

- despite having no known medical qualifications, advising the doctor that these bonusses had led to "many suicides" and "this case clearly could go that way";

- thinking a written submission was an appropriate place to complain about the EU budget and national taxation policy.

2. All this was done by the present appellant's representative before the First-tier Tribunal. The representative was not a friend or family member but someone who described himself as a member of a consultancy organisation. Some might say such a representative is no more than a significant nuisance since what really matters is the evidence put before the tribunal. But this representative's involvement went beyond supplying pointless written arguments. The representative also purported to give evidence about the claimant's disabilities that was both dramatic and bizarre, such as the assertion that she experienced panic attacks that lasted for 18 hours.

3. The inconsistencies between the appellant's direct evidence and that relayed by her representative was a factor in the First-tier Tribunal determining that her entire evidential case was unreliable. In the unusual circumstances of this case, I decide that the tribunal erred in law. Before deciding whether the appellant's entire case lacked credibility, the tribunal should have considered whether there was a need to separate out the appellant's direct evidence from that relayed by her representative.

Background

4. Miss I completed a Personal Independence Payment (PIP) disability questionnaire, having been required to claim PIP as part of the DLA-PIP conversion process. Miss I's claim relied on mental health problems.

5. The DWP arranged for Miss I to attend a consultation with a Healthcare Professional (HCP), which took place on 30 March 2016. The HCP's opinion was that Miss I's condition merited zero points under the PIP assessment criteria.

6. On 28 April 2016, the Secretary of State for Work & Pensions, agreeing with the HCP's opinion, decided that Miss I was not entitled to PIP. Miss I appealed to the First-tier Tribunal. She was represented by an adviser from an organisation called the Clifford Johnson Consultancy who has also represented her before the Upper Tribunal.

7. Dated 21 June 2016, Miss I's notice of appeal to the First-tier Tribunal was completed by her representative. It argued the DWP's decision was "at best uneducated and wrong" and politically motivated. As I informed Miss I's representative at the hearing of her application for permission to appeal against the tribunal's decision could not have helped her cause. Miss I's representative obviously cares passionately about the rights of persons with mental health problems and that is to his credit. However, in order to achieve the objectives that he seeks in a Tribunal context, he ought to reconsider his approach. A Tribunal can do little in response to vague assertions, especially where they allege bad faith. The best way to help a client is to take an analytical approach identifying specific claimed weaknesses in a decision and identifying evidence or legal points in support of such arguments.

8. On 21 October 2016, the representative emailed a specialist doctor, at an NHS email address, beginning with "further to my phone call to you, my client needs a full and comprehensive report…". Later, the email informed the doctor that Miss I was a victim of CAPITA, a private company "paid bonuses by the government to remove people from the welfare system", "that is why there are so many suicides" and "this case clearly could go that way". The email was copied to the Wales area First-tier Tribunal's generic email address with a request for postponement of the hearing, which was refused.

9. However, Miss I did supply a report from her consultant psychiatrist dated 28 October 2016 (p.105) together with a written submission from her representative. Parts of the submission were completely irrelevant, for example complaints about national taxation policies and the UK's contribution to the EU budget.

10. The First-tier Tribunal heard but dismissed Miss I's appeal on 8 November 2016. Miss I attended the hearing with her representative.

11. Miss I's representative then wrote another unnecessarily antagonistic letter, this time to the First-tier Tribunal when seeking its permission to appeal to the Upper Tribunal. Accusing the tribunal of lacking independence, being on the side of CAPITA and corruption (too scared to allow appeals because that would put tribunal members' jobs at risk), the letter also said that "only someone very stupid" would have relied on the HCP's report. This letter was a disgraceful abuse of the informality that is a distinctive and important feature of tribunal proceedings. If a solicitor acted in a similar way in court proceedings, the solicitor might well face professional disciplinary consequences.

12. Miss I's representative's written application to the Upper Tribunal for permission to appeal began by asserting that everyone's human rights meant they had to be treated fairly and reasonably. Well, yes, but simply stating that point did not take Miss I's case anywhere. The application further argued it was an "outrage" to rely on the report of an incompetent HCP motivated by the opportunity to earn bonuses for denying people their benefits. It also

submitted that the First-tier Tribunal's disability member made it clear that tribunal judges had no idea of the law and the tribunal itself lacked the expertise to decide Miss I's appeal.

13. The written application for permission to appeal was not worth the paper it was written on. Miss I would have had no cause for complaint had the Upper Tribunal, there and then, refused permission to appeal. The written application disclosed no possible error of law. As it was, a fellow Upper Tribunal judge directed a hearing of Miss I's application. The hearing before myself, at Cardiff Civil Justice Centre, was attended by Miss I and her representative. The Secretary of State for Work & Pensions was not represented.

14. Despite all those criticisms of the way in which Miss I's case was conducted, I decided to grant her permission to appeal to the Upper Tribunal. The medical evidence suggested that Miss I had very real mental health problems and I was concerned that ineffective representative might have added to her problems by depriving her of the opportunity of a proper adjudication of her possible entitlement to PIP.

The grounds of appeal

15. I refused permission to appeal on all the incoherent grounds set out in Miss I's written application for permission to appeal. I granted Miss I permission to appeal on a somewhat unusual ground which, of necessity, was not advanced by Miss I's representative.

16. The First-tier Tribunal found that Miss I's evidence was inconsistent, which the tribunal relied on in further finding that her evidence was unreliable and lacked credibility. If Miss I's evidence was taken to include the factual assertions made by her representative, those findings could not be faulted.

17. Much of the evidence taken into account by the First-tier Tribunal took the form of factual assertions made by her representative. If the dramatic and bizarre nature of these assertions is ignored for now, there was no obvious indication that the representative simply made up these assertions. However, given the nature of the representative's factual assertions and the medical evidence that Miss I does have mental health problems, this case raised the question whether the tribunal, before finding that Miss I's evidential case was entirely unreliable, should have separated out the evidence given directly by her from the range of factual assertions made by her representative. Arguably, the indicators of possibly damaging representation for a mentally ill appellant, whose condition might have affected her judgement, were such that the tribunal erred in law by failing to ask whether it should separate out Miss I's evidence from the factual assertions made by her representative.

18. The grounds on which permission to appeal were granted clearly created a potential conflict of interest for Miss I's representative. Could he really be expected to assist her to

pursue grounds of appeal which, if they were to succeed, would involve serious criticisms of his conduct? I gave the following case management directions:

> "1. This grant of permission to appeal is to be sent to Miss I **and** her representative.
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> 2. Within **one month** of the date on which these directions are issued, Miss I must write to the Upper Tribunal:
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> (a) stating whether or not she wishes to rely on the grounds on which permission to appeal has been granted. If she does not reply, I shall assume she does not wish to rely on those grounds; and
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> (b) whether she is still represented by Mr Johnson. Miss I can be represented by a representative of her own choosing, e.g, Swansea CAB, Swansea Carers Welfare Rights Service or a local authority welfare rights service such as Neath Port Talbot CBC's welfare rights service…Alternatively, she can simply represent herself.
>
> 3. If Mr Johnson wishes to comment on this grant of permission to appeal, for example on the arguably negative views it expresses about his conduct of Miss I's case, he must do so in writing within **one month** of the date on which these directions are issued."

19. The directions required a response before the Secretary of State was required to respond to Miss I's appeal.

The arguments

20. Miss I's representative responded on her behalf to the case management directions referred to above, she having evidently decided to retain his services. The reply in fact tentatively agreed with the Upper Tribunal's reasons for granting permission to appeal, stating "there is an element of truth in the criticisms". The representative also requested a hearing before the Upper Tribunal determined Miss I's appeal.

21. The Secretary of State supports this appeal. Her representative submits that the First-tier Tribunal's decision involved the error of law described in the determination granting Miss I permission to appeal. The representative invites the Upper Tribunal to set aside the tribunal's decision and remit her appeal against the Secretary of State's decision as to Miss I's PIP entitlement to that tribunal for re-determination. Neither Miss I, nor her representative on her behalf, replied to the Secretary of State's response.

Conclusions

22. In the vast majority of cases, the First-tier Tribunal is undoubtedly entitled to accept that a representative's factual assertions, especially those of a professional representative, are made on a claimant's instruction so that they may be treated as part of the body of evidence advanced by the claimant. That tribunal has a demanding workload. To expect it adopt a generally circumspect view of factual assertions advanced by a representative would create a

significant extra burden. But, perhaps more importantly, this would also risk damaging the trust and confidence that a claimant needs to have in his or her representative. I very much doubt that a tribunal could be criticised for accepting the evidential case put forward by, for example, a recognised advice organisation such as Citizens Advice or a local authority welfare rights service.

23. In this case, however, certain of Miss I's representative's factual assertions and other arguments were so bizarre that, in my view, the tribunal should have been put on notice that the representative, rather than Miss I, might not be reliable. For example, the representative's written submissions:

(a) asserted that Miss I's panic attacks could last for up to 18 hours rendering her unable to cook for herself. Having gone through the papers, I cannot see that Miss I ever made a claim of that sort herself;

(b) in discussing the DWP's analysis of Miss I's ability to cook and prepare food, the representative wrote that "I cannot believe the decision maker could be this thick" and the flawed analysis of panic attacks "really warrants a full police criminal investigation";

(c) argued that the HCP should also be the subject of a criminal investigation;

(d) asserted that, when Miss I was mentally ill, one of her carers would have to undress her. Having gone through the appeal papers, I cannot see that Miss I herself ever claimed to need carers to undress;

(e) asserted that when Miss I was mentally ill she "had no idea where she is and should be provided with continence pads". Again, I cannot identify any evidence given directly by Miss I in which she claimed to need continence pads;

(f) the HCP's opinion as to which PIP assessment points were justified was at best childish and at worst smacked of total incompetence";

(g) purported to be competent to assess whether Miss I was at risk of suicide as a result of being refused PIP.

24. In my judgment, this representative's conduct of the case of a claimant with diagnosed mental illness was so odd that the First-tier Tribunal should have asked itself whether it was he, rather than Miss I, who was unreliable. The overriding objective of the tribunal's procedure rules is to enable the Tribunal to deal with cases fairly and justly (rule 2(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008). A specified aspect of dealing with cases fairly and justly is ensuring, so far as practicable, that a party is able to participate fully in the proceedings (rule 2(2)). In this case, there was a clear

possibility that Miss I's ability to participate in the proceedings was being damaged, rather than enhanced, by her representative. The tribunal's failure to enquire into this possibility was an error on a point of law. Had the representative's 'evidence' not been taken into account, the tribunal could, quite possibly, have decided that Miss I's evidence was not unreliable and lacking in credibility. The error was therefore material.

25. I set aside the First-tier Tribunal's decision. I refuse to hold a hearing before determining this appeal. Since Miss I's representative does not dispute the criticisms set out in my permission to appeal determination, I do not see what else remains to be said. Miss I's appeal against the Secretary of State's decision as to her PIP entitlement is remitted to the First-tier Tribunal for re-determination before a differently-constituted panel. I cannot re-make the tribunal's decision because, lacking medical expertise, I am not competent to make the findings of fact necessary for a just determination of Miss I's appeal.

26. Given the unusual background to this case, I consider that a salaried judge of the First-tier Tribunal needs to consider, at the earliest opportunity, whether any case management directions are required.

DIRECTIONS

I direct as follows:

1. Miss I's appeal against the Secretary of State's decision of 25 April 2016 is remitted to the First-tier Tribunal for re-determination.
2. The First-tier Tribunal that re-determines the appeal must not include any member of the panel whose decision has been set aside in these proceedings;
3. The First-tier Tribunal is to hold a hearing before re-determining the appeal.
4. Upon receipt of the file, First-tier Tribunal staff are to place it before a salaried judge of that tribunal to consider whether further case management directions are required.

Apart from directions 1 and 2, the above directions may be varied by direction of the First-tier Tribunal.

Miss I is reminded that the First-tier Tribunal may not take into account circumstances not applicable at 25 April 2016, that is the date of the Secretary of State's decision (section 12 of the Social Security Act 1998). Evidence generated after that date may be taken into account if it is relevant to the circumstances at 25 April 2016.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
3 October 2018