IN THE UPPER TRIBUNAL **Appeal No: CUC/270/2019**

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 Birkenhead on 12 October 2018 under reference SC947/18/00644 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 entirely 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 by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

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

(2) The appellant is reminded that the tribunal can only deal with her situation as it was on or before 13 April 2018.

(3) If the appellant has any further evidence that she wishes to put before the tribunal that is relevant to her health conditions and their effects on her functioning on or before 13 April 2018, this should be sent to the First-tier Tribunal's office in Liverpool within one month of the date this decision is issued.

(4) The First-tier Tribunal is bound by the law as set out below.

REASONS FOR DECISION

1. I am satisfied based on the arguments before me that the First-tier Tribunal erred materially in law in its decision of 12 October 2018 ("the tribunal") and that its decision should be set aside as a result. The parties are agreed that this should be the result.

2. The appellant in her reply to the Secretary of State's observations on the appeal to the Upper Tribunal seeks an oral hearing of the appeal. However, as I read what she says she is really seeking an oral hearing before the First-tier Tribunal on the factual merits of whether she had limited capability for work in April 2018. I have provided for such an oral hearing in the directions above. There is no need to hold an oral hearing on whether the tribunal erred materially in law in its decision of 12 October 2018 as I am satisfied it did and neither party is arguing the contrary.

3. The tribunal erred in law in my judgment in failing adequately to explain why it decided the appeal without a hearing under rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. Rule 27(1) provides as follows.

> "27.— (1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
> (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
> (b) the Tribunal considers that it is able to decide the matter without a hearing."

4. The consideration found in rule in rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 is subject to the overriding objective in rule 2 of those rules, which includes dealing with an appeal fairly and justly and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. Given these provisions, which the tribunal was bound to

work under and apply, I do not consider that it investigated sufficiently in its reasoning and fact-finding whether the appointments to which the appellant referred on page 28 realistically precluded the appellant from being able to attend any oral hearing of her appeal. Even the tribunal seemed to have doubts about whether there would be so many appointments as to preclude the possibility of a hearing being feasible.

5. The tribunal said the following about this matter in its reasoning.

> **Preliminary issue -hearing on the papers**
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> [The appellant] had indicated on appeal form SSCS1 that she completed on 9.05.2018 that she wanted her appeal decided on the papers (page 28 in the bundle of appeal papers). She had written next to her choice: "I cannot attend an appeal due to appointments". No further details of the appointments referred to as preventing her attendance were provided then or later. It was not made clear why the appointments were, for example, so numerous as to prevent attendance.
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> The appeal first came before a tribunal sitting at Stockport on 31.7.2018. That tribunal decided to adjourn for the respondent to supply papers relating to the appellant's Personal Independence Payment (PIP) claim. [The appellant] will have received a copy of that adjournment notice. She did not subsequently change her choice of having a hearing on the papers rather than an oral hearing. The appellant had made a clear choice of the way in which she wanted her appeal dealt with and had not changed her mind on that point.
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> The tribunal had before it a considerable amount of evidence including a physiotherapist's assessment for Universal Credit, hospital letters, a nurse's assessment for PIP, and various documents setting out the appellant's explanation of the nature and effects of her illness. The tribunal concluded that it could make a fair decision based on the paperwork. It was just and proportionate to proceed to make such a decision.
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> Neither party to the appeal had elected to have an oral hearing, and have considered Rules 27(1)(b) and 2 of the First-tier Tribunal Procedure Rules, the tribunal decided that it was just to proceed to decide the case on the papers before it."

6. Although on one analysis the following is irrelevant to my consideration of whether the tribunal erred in law on what it had before it, the appellant told me at the hearing when I was considering whether to give her permission to appeal that before completing page 28 in the way she did she had communicated with the First-tier Tribunal's office

in Liverpool (I suspect she may have meant by this the contact centre in Loughborough, though nothing turns on this) about the options given at the top of page 28. She told me that she had explained to that office that she had a number of regular medical appointments and was awaiting an operation. It appears she was told that the First-tier Tribunal could not say when any hearing of her appeal would take place and that she was better opting for a decision made on the papers. It would seem no attempt was made by the First-tier Tribunal's staff to explore the option of an oral hearing but with dates or days to avoid (e.g. the dates on which the appellant had her regular appointments). On the face of it, this interaction is not consistent with the appellant clearly and on a properly informed basis electing for a 'hearing on the papers' in circumstances where it may have been possible for an oral hearing to have been arranged that did not clash with her regular appointments.

7. Where the above interaction does have relevance to the adequacy of the tribunal's exploration and consideration of the evidence before it is that it highlights the failure, in my judgment, of that tribunal to properly look into why the appointments would have precluded the appellant from attending an oral hearing of the appeal. The tribunal itself appears (rightly) to have doubted that this would be so, but it then failed in my judgment to carry that consideration through to its consideration of (a) whether the appellant had on a properly informed basis, per rule 27(1), "consented to…. the [appeal] being decided without a hearing" and/or (b) whether it was "able to decide the [appeal] without a hearing". The requirement under rule 27(1) is a strong one – the Tribunal **must** hold a hearing before making a decision which disposes of the [appeal] – and is only removed if both parties have consented to there being no hearing and the Tribunal considers it is able to decide the appeal without a hearing. In this case in my judgment, for the reasons already given, the tribunal's consideration of the satisfaction of both exceptions to the oral hearing requirement was inadequate.

8. The tribunal also erred in law, in my view, in only considering whether the exceptions in rule 27(1) were satisfied as a preliminary issue at the outset of its consideration of the appeal. That is plain from the subheading the tribunal used in the passages quoted above and its use of phrases such as "proceed to decide" in those passages. Being satisfied that the exclusions in rule 27(1) do apply so as to remove the legal requirement that an oral hearing be held is not limited to some preliminary assessment stage of deciding whether to consider all the paper evidence (though it plainly does arise at that stage). That it is not so limited is clear from the language in rule 27(1). Satisfaction that the two exceptions apply arises "before making a decision which disposes of the proceedings", which plainly extends up to the point at which the decision on the appeal is to be made and therefore extends to the point after the First-tier Tribunal has evaluated all the paper evidence before and is on the point of making its decision on the appeal. It is not, therefore, as the tribunal considered, just a preliminary consideration.

9. For the reasons given above, the tribunal's decision dated 12 October 2018 must be set aside. The Upper Tribunal is not able to re-decide the first instance appeal itself. The appeal will therefore have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal (Social Entitlement Chamber), at an oral hearing.

10. 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.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 2nd September 2019