[2020] UKUT 287 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CI/1395/2019**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

SM

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 15 October 2020
Decided on consideration of the papers

Representation
Appellant: In person
Respondent DWP Decision-Making and Appeals, Leeds

DECISION

The appeal to the Upper Tribunal succeeds.

The First-tier Tribunal made a legal mistake in relation to the claimant's appeal (ref. SC188/18/04092) which was decided at Cardiff on 8 February 2019.

I set that decision aside and remit the case to the First-tier Tribunal for reconsideration in accordance with the directions given below.

I draw the claimant's attention to the fact that those directions are addressed to her as well as to the Secretary of State and that Direction 6 below includes a time limit.

DIRECTIONS

To the First-tier Tribunal

1 The First-tier Tribunal must hold a hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

2 That hearing may take place in accordance with any relevant Practice Directions and Practice Statements that are in force during the Covid-19 pandemic.

3 The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge or medical member who made the decision I have set aside.

To the claimant

4 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 8 February 2019 made a legal mistake, not because it has been accepted that you are entitled to industrial injuries disablement benefit. Whether or not you are entitled will now be decided by the new tribunal.

5 You are reminded that the new tribunal must consider whether the Secretary of State's decision was correct at the time it was made. That means:

(a) it cannot take into account changes in your circumstances that occurred after 17 October 2018; and

(b) it can only consider evidence from after that date if it casts light on how you were on or before 17 October 2018.

6 If there is any further written evidence that you would like the new tribunal to consider (and which relates to the period on or before 17 October 2018) you must now send it to HM Courts and Tribunals Service at Cardiff, quoting the reference, SC188/18/04092, so that it is *received* no later than **one month** from the date on which this decision is *sent* to the parties.

REASONS

1. Both parties are agreed that the First-tier Tribunal's decision should be set aside for material error of law and that the matter should be remitted to the First-tier Tribunal for reconsideration.

2. The issue before the First-tier Tribunal was whether the claimant should be diagnosed as suffering from the Prescribed Disease, carpal tunnel syndrome (PD A12).

3. Carpal tunnel syndrome ("CTS") is a condition that affects the Median nerve. To quote the evidence of Dr Susan Reed, a medical advisor to the Department for Work and Pensions, as set out in the Schedule to *CI/3745/2006*:

> "**Carpal Tunnel Syndrome**
>
> 1. The Median nerve enters the hand by passing through a tunnel formed by the convex anterior surface of the carpal bones and a ligament – the flexor retinaculum. As well as the Median nerve, the flexor tendons (i.e. the tendons which bend the fingers) of the fingers run through this tunnel. This is known as the Carpal Tunnel. The Ulnar and Radial nerves **do not** enter the hand via this tunnel.
>
> 2. Alterations in any of the anatomical structures in the tunnel can result in a loss of volume in the available space (which at best is limited) in the carpal tunnel and so produce compression of the median nerve: Carpal Tunnel Syndrome
>
> **Aetiology**
>
> 3. Carpal tunnel syndrome is caused by compression of the median nerve as it passes deep to the flexor retinaculum. However in relation to the use of vibrating tools, the pathology may be due to physical trauma to the nerve itself and/or blood vessels to the nerve, which may explain the poor results with carpal tunnel decompression in patients with vibration induced Carpal Tunnel Syndrome
>
> 4. Carpal Tunnel Syndrome is very common in the population as a whole, and it is more common in women than men. In women it occurs in 7 per 100 and in men 1 per 100." (original emphasis)

4. The fact that only the Median nerve—and not the Ulnar or Radial nerves, the other two nerves that supply the hand—pass through the carpal tunnel is important. It means that if a claimant's neurological symptoms in the hand do not follow the distribution of the Median nerve then, at least—and subject to what is said in paragraph 14 below—

any loss of function in the hand is not caused solely by PD A12 and, at most, that the claimant does not suffer from that condition.

5. In PD A12 cases, it is therefore important for the First-tier Tribunal to direct itself correctly about what the distribution of the Median nerve is. In this case, the Tribunal's written statement of reasons says

> "The appellant's history of symptoms in her ring finger is not consistent with carpal tunnel syndrome because the ulnar nerve *not the median nerve* serves the ring finger. Carpal tunnel syndrome does not cause symptoms in the ring finger." (my emphasis).

6. I accept that, sitting together on an appeal under the Industrial Injuries Scheme, the judge and specialist medical member were an expert tribunal. I am also acutely aware that I am not a doctor and that the specialist medical member is.

7. Nevertheless, I am unable to escape the conclusion that the words I have italicised above are just plain wrong: the Median nerve also serves the lateral half of the ring finger (*i.e.,* the side nearest the thumb).[1]

8. I will not quote from all the medical literature that I have read as background to this appeal, because it is all to the same effect. Five examples will suffice:

9. First, when granting permission to appeal, I quoted from the British Medical Association's *Illustrated Medical Dictionary* (Updated 2nd edition. Dr Michael Peters, Dorling Kindersley, London, 2013). I chose to do so, not because it was the only—or most authoritative—publication I had consulted but because it is intended to be read and understood by people without medical qualifications. The relevant passages are as follows:

> "**median nerve** One of the main nerves of the arm. It is a branch of the *brachial plexus* and runs down the arm from the shoulder into the hand. The median nerve controls the muscles that carry out bending movements of the wrist, fingers and thumb and that rotate the forearm palm-inwards. The nerve also conveys sensations from the thumb and the first three fingers [*i.e.*, the index, middle and ring fingers], and from the region of the palm at their base.
>
> Damage to the median nerve may occur as a result of injury to the shoulder, a *Colles'* fracture just above the wrist, or pressure on the nerve where it passes through the wrist (*carpal tunnel syndrome*). Symptoms of nerve damage include numbness and weakness in areas controlled by the nerve."

[1] There is some evidence that CTS can also produce symptoms in the hand as a whole: see the second underlined passage in paragraph 14 below.

and

> "**carpal tunnel syndrome** Numbness, tingling and pain in the thumb, index finger and middle fingers [NB **not** "middle finger"] caused by compression of the median nerve at the wrist. …"
>
> I have added the underlining in those passages for emphasis.

10. The second passage comes from the *Oxford Textbook of Medicine* (Fifth Edition. ed, Warrell, Cox and Firth. Oxford University Press. 2010). I have chosen that publication because it is an authoritative work aimed at the medical profession and because every permanent venue of the social security jurisdiction of the Social Entitlement Chamber has—or should have—a copy. In Chapter 24.16 (page 5081), it states:

> "**Median nerve (C6-8, T1)**
>
> The median nerve arises from the medial and lateral cords of the brachial plexus and descends with the brachial artery through the upper arm entering the forearm deep to the bicipital aponeurosis. It has no muscular branches above the elbow. … The main trunk passes deep to the flexor retinaculum of the wrist and its recurrent muscular branch supplies abductor pollicis brevis and opponens pollicis, and contributes to the innervation of the flexor pollicis brevis. It also supplies the lateral two lumbrical muscles, the skin over the lateral aspect of the palm, and the lateral three and a half digits over their palmar aspects and terminal parts of their dorsal aspects."

It is unnecessary for me to explain many of the medical terms in that passage, but the "lateral" digits are the ones that are furthest from the mid-line of the body when the hand is turned so that the palm faces forward. In other words, when it says that the median nerve supplies "the lateral three and a half digits", the *Textbook* is saying that it supplies the thumb, the index and middle fingers and the half of the ring finger that is nearer the middle finger.

11. The third to fifth examples were helpfully provided by the Secretary of State's representative who supports this appeal.

12. The third example is a diagram of the areas of the hand supplied by, respectively the median, radial and ulnar nerves. It was published by the BMJ (formerly, the British Medical Journal) as part of an article by Burton, Chesterton and Davenport entitled, *A Painful Tingling Hand* (BMJ 2016;355:i6386). I have included it as an Appendix to this decision. It demonstrates more clearly than words can that:

(a) looking at the palm of the hand—what doctors call the "palmar" aspect—the median nerve supplies the thumb (other than at the base), the index finger, the middle finger and the side of the ring finger nearer the middle finger; and

(b) looking at the back of the hand—the "dorsal aspect"—it supplies the index finger, the middle finger, and the side of the ring finger nearer the middle finger.

There is no room for any misunderstanding about this. The subject of the diagram is actually wearing wedding and engagement rings on the ring finger. On the palmar aspect, the line denoting the boundary of the area supplied by the median nerve runs from the palm along the middle of the ring finger bisecting the rings. On the dorsal aspect, the equivalent line runs along the ring finger from a point slightly to the right of the jewel on the engagement ring.

13. The fourth example is from *Anatomy, Shoulder and Limb, Median Nerve* by Murphy and Morrisonponce (Statperls 2020) which includes the following passages:

> "**Structure and Function**
>
> The median nerve predominantly provides motor innervation to the flexor muscles of the forearm and hand as well as those muscles responsible for flexion, abduction, opposition, and extension of the thumb. The median nerve also provides sensory innervation to the dorsal aspect (nail bed) of the distal first two digits of the hand, the volar aspect of the thumb, index, middle, and half of the ring finger, the palm, as well as the medial aspect of the forearm.
>
> **Nerves**
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> …
>
> At its narrowest, the carpal tunnel's cross-sectional area is less than 2 cm. The median nerve passes directly beneath the flexor retinaculum sheath, alongside nine other muscular tendons. This high-traffic area is a prime spot for compression, and in fact, of all the entrapment neuropathies, carpal tunnel syndrome (described below) has been reported to be the most common.
>
> …
>
> The last contribution of the median nerve to the thumb is from the anterior interosseous nerve, which travels outside of the carpal tunnel and supplies the flexor pollicis longus. At the palmar aponeurosis, the median nerve splits into radial and ulnar divisions which further separate off into the common palmar digital branches. These digital

> branches innervate the first two lumbrical muscles and provide sensation to the palmar side of the thumb, index finger, middle finger, and the radial half of the ring finger. The median nerve also exclusively supplies sensory innervation to the dorsal surface of the index and middle fingers past the proximal interphalangeal joint (i.e., over the nailbeds)."

The underlining in that passage is mine and I have omitted the footnotes. At least in this context, I hope it is not an oversimplification to say that "sensory innervation" is medical terminology for "feeling".

14. Fifth, and finally, the Secretary of State's representative has referred me to the *Textbook of Peripheral Neuropathy* (ed Donofrio. Demos Medical Publishing. 2012), which states, on page 9:

> "**Median Neuropathy**
>
> The median nerve can be entrapped at various levels, the most common site being at the wrist. This neuropathy is the most common of all entrapment neuropathies affecting the upper extremity.
>
> **Anatomy**
>
> …
>
> The median nerve, along with the 9 Flexor tendons of the hand, continues through the carpal tunnel, which is formed by the transverse carpal ligament and carpal bones. After passing into the palm, the nerve divides into sensory and motor trunks. The sensory trunk divides further, providing digital sensory nerves to innovate the first 3 fingers and the lateral portion of the fourth (ring finger).
>
> …
>
> *Clinical Features of Median Nerve Dysfunction*
>
> **A. Median neuropathy at the wrist (carpal tunnel syndrome)**
>
> This is the most common entrapment neuropathy affecting the upper extremity. Patients present with a variety of signs and symptoms, including weakness and sensory disturbances. The most common complaint is that of pain and paraesthesias. Pain usually localises to the wrist and fingers but may radiate to the forearm, arm or even the shoulder. Some patients reported a diffuse aching sensation involving the entire arm. Sensory disturbances usually involve the lateral 3 fingers; however, it is not uncommon for patients to report

> paraesthesias as involving the entire hand, including regions supplied by the ulnar nerve."

Again the underlining is mine and I have omitted cross-references.

Why isn't this just an error of fact?

15. The Upper Tribunal can only allow an appeal if the decision of the First-tier Tribunal "involved the making of an error on a point of law" (see section 12(1) of the Tribunals, Courts and Enforcement Act 2007) and the error made by the Tribunal in this case about the distribution of the median nerve is an error of anatomical fact.

16. It is not, however, *just* an error of fact. The Court of Appeal has said that, in some circumstances, making an error about an *uncontentious* fact can also be an error of law. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9], the Court gave a "a brief summary of the points of law that will most frequently be encountered in practice" including:

> "(vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

17. That head of the summary is derived from the earlier Court of Appeal decision in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49. In that case, the facts were stated (at [7]) to be as follows:

> "E is an Egyptian national who has lived outside Egypt all his life. He came to this country from Bangladesh in April 2001 and claimed asylum. His case is that he is a sympathiser of the Muslim Brotherhood, and that his family, particularly his father, had been strongly involved in Muslim Brotherhood activities. He said that he had left Bangladesh because the Egyptian authorities were looking for him and that he could not renew his passport without going to Egypt. He claimed that if he were required to return to Egypt he would be subject to risk of detention and torture."

The Immigration Appeal Tribunal—which exercises an adversarial jurisdiction: see *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552 at [34]—accepted:

> "… that there was evidence that Muslim Brotherhood members were detained and arrested in Egypt"

but refused asylum on the basis that:

> "…the arrests in the year 2000 were related to the elections in that year, and that most of those arrested were released after a short period." (see [9])

18. E then appealed to the Court of Appeal on the basis that the finding that the arrests in 2000 had been confined to that year was incorrect, as evidenced by two reports by international non-governmental organisations which had been published after the hearing of the appeal to the IAT but before the promulgation of its decision.

19. Having reviewed the authorities, the Court stated:

> "63. In our view, [*R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330] points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:
>
> i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);
>
> ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
>
> iii) The claimant could not fairly be held responsible for the error;
>
> iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;
>
> v) The mistaken impression played a material part in the reasoning.
>
> 64-65. …
>
> 66 In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent

> from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

At [91(2)] of E, the basis of such an appeal was summarised as being 'unfairness resulting from "misunderstanding or ignorance of an established and relevant fact"'.

20. Social security law is a "statutory context where the parties share an interest in co-operating to achieve the correct result": see, *e.g.*, *R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble* [1958] 2 QB 228 and *Kerr v Department of Social Development*, [2004] UKHL 23 (also reported as R 1/04 (SF)). The ground of appeal identified in *E* is therefore potentially applicable in this case: see further *DG* and *Hussain* (paragraph 24 below).

Reliance on new evidence

21. A further issue arises from the fact that the evidence I have set out at paragraphs 9-14 above was not before the Tribunal.

22. As part of the Court's concluding summary in *E*, Carnwath LJ (as he then was) stated that the admission of new evidence to establish the necessary "misunderstanding or ignorance of an established and relevant fact" is

> "subject to *Ladd v Marshall* principles, which may be departed from in exceptional circumstances where the interests of justice require": see [91(iii)].

23. Those principles are that:

(a) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);

(b) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive);

(c) the new evidence is apparently credible although it need not be incontrovertible,

see the judgment of Denning LJ (as he then was) in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491.

24. The *Ladd v Marshall* principles have been applied in cases involving entitlement to social security benefits by the Court of Appeal in *Hussain v Secretary of State for Work and Pensions* [2016] EWCA Civ 1428 and the Upper Tribunal (Judge Ovey) in *DG v Secretary of State for Work and Pensions* (II) [2013] UKUT 474 (AAC).

25. *Hussain* concerned the refusal of a claim for employment and support allowance, which was confirmed by the First-tier Tribunal in March 2013. The issue was whether the Upper Tribunal should have taken into account a consultant's report from July 2013 when considering an "error of law" appeal against that decision. Speaking for the Court, Bean LJ noted (at [26]) that it was "common ground" that new medical evidence sought to be adduced for the first time in the Upper Tribunal must be in line with the principles set out in *Ladd v Marshall.* He added, however, that:

> "There are cases in which an over strict application of the first principle against a party who appeared without representation, as Mr Hussain did in the First-tier Tribunal, can be contrary to the overriding objective of dealing with cases justly. I prefer, therefore, rather than asking whether a consultant's report could have been obtained with reasonable diligence before the hearing in the FTT, to concentrate on the question of whether it would have been potentially decisive in Mr Hussain's favour or at least have had an important influence on the result of the appeal."

In the Court's view the consultant's report on Mr Hussain would not have affected the outcome.

26. In *DG*, the First-tier Tribunal, relying at least in part on a clinical examination by the medical member, found as a fact that the claimant had not fractured her wrist. As the claimant's evidence was to the contrary, the Tribunal formed an adverse view of her credibility and dismissed her appeal. X-ray evidence—that had not been before the Tribunal—showed that the claimant had been telling the truth.

27. Having set out the *Ladd v Marshall* principles, Judge Ovey continued:

> "17. In the present case it may be said that the Tribunal Judge has already admitted the new evidence, since he clearly relied on the claimant's evidence about her broken wrist in giving permission to appeal. For the avoidance of doubt, I make clear that in my view it is proper for me to have regard to that evidence. Taking the *Ladd v. Marshall* principles in reverse order, the evidence is clearly credible; it is highly material to the tribunal's findings on the claimant's own credibility and thus it may fairly be said that it would probably have had an

> important influence on the result of the case; and in my view the claimant is not reasonably to be criticised for not having obtained X-ray evidence to establish whether or not her wrist was broken before the appeal was heard, since she had no reason to suppose that her ability to move her wrist would be a relevant issue. In a context such as the present it seems to me that the first *Ladd v. Marshall* principle must extend to cases where the new evidence was not obtained because the person relying on it had no reason to suppose that the point to which it was directed would be relevant, so that there was no failure of reasonable diligence in the failure to obtain the evidence."

28. I respectfully agree with that passage, particularly the conclusion that the first *Ladd v Marshall* principle must extend to cases where the new evidence was not obtained because the person relying on it had no reason to suppose that the point to which it was directed would be relevant.

29. However, the fact that Judge Ovey had to jump through those hoops to reach what was obviously the only just decision, emphasises the artificiality of applying the *Ladd v Marshall* principles—which were developed in the context of whether a judgment given following a full adversarial trial of pleaded issues before the High Court could be challenged on the basis of new evidence—to the much briefer and less formal proceedings of a tribunal with specialist members, an inquisitorial jurisdiction, and an enabling role.

30. First, the *Ladd v Marshall* principles are about the admissibility of evidence. But admissibility is not a relevant consideration in many tribunals. The Social Entitlement Chamber, in particular has no rules on admissibility. Subject to the express exercise of the First-tier Tribunal's powers under rule 15(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, all relevant evidence is admissible and the only issue for the Tribunal is the weight to be attached to it.

31. Second, the judicial policy behind the *Ladd v Marshall* principles is the promotion of finality (see, in particular, the concurring judgment of Hodson LJ in that case). Finality is important in adversarial proceedings: it is desirable that a line should be drawn when litigation is concluded and that all parties should be able to rely on the outcome. There is also a strong public policy that no-one should be vexed with the same claim more than once.

32. In my judgment, however, the requirement for finality is less pronounced in social security appeals before the Social Entitlement Chamber of the First-tier Tribunal. As I explained in *DTM v Kettering (CTB)* [2013] UKUT 625 (AAC):

> "63 Entitlement to social security benefits is conferred by Parliament as a matter of right on claimants who satisfy the conditions of

> entitlement. The authorities that administer those benefits must do their best to ensure that such claimants receive their proper entitlement. If they do not do so, the purpose of the legislation conferring the right to benefit is frustrated as much as it is if benefits are awarded to those who are not entitled to them. The role of a respondent to a social security appeal is therefore to help the Tribunal arrive at the correct decision. There is no legitimate interest in the maintenance of the decision under appeal if that decision is incorrect …."

The undoubted administrative convenience for the Department in having a final decision on a claimant's entitlement is thus tempered by its obligation to help ensure as far as is practicable that that decision is correct. Although not directly relevant in this case, the different weight accorded to finality and correctness in social security appeals is reflected in section 17(2) of the Social Security Act 1998, which disapplies the ordinary rules on issue estoppel except where regulations say expressly that they are to apply.

33. Third, the *Ladd v Marshall* principles presuppose that disputed issues are decided *on evidence*. But in proceedings before a tribunal with an inquisitorial jurisdiction and specialist members, that is not always the case.

34. In the present case, the papers before the First-tier Tribunal did not contain a single sentence of evidence about the distribution of the Median nerve. The source of the Tribunal's incorrect finding that the Median nerve does not serve the ring finger can only have been that the medical member misdirected the Tribunal about the point.

35. Making a finding of fact for which there is no evidence is normally regarded as an error of law. That principle cannot, however, apply to statements of fact about issues that are not normally the subject of evidence. If the Tribunal's statement about the distribution of the Median nerve had been correct, it would still not have been based on any evidence, but it would not have involved an error of law.

36. That is because a knowledge of the anatomy and physiology underlying the conditions from which a claimant suffers (including the distribution of nerves) is one of the things that a doctor brings to his or her work as a medical member of a tribunal. It is often said that the Social Entitlement Chamber's inquisitorial and enabling role exists because social security law is particularly complex and an unrepresented appellant (as most are) cannot be expected to have a detailed knowledge of it. But, for those benefits that are awarded because of functional restrictions on a claimant's ability to carry on the normal activities of life, the same is equally true of the underlying medical issues. The claimant will often not appreciate what evidence is relevant. By bringing medical knowledge and experience to the questions he or she asks the claimant, and through his or her contributions to the decision-making process, a medical member helps the tribunal reach a fair and just decision without unnecessary delay or formality and often without the need for the sort of detailed medical evidence and legal representation that

are common in personal injury disputes raising similar issues. It cannot be the case that if, as part of that process, the Tribunal decides that (say) that the existence of a particular state of affairs would be contrary to medical science, it is making an error of law because the source of that judgment is ultimately the advice of its medical member rather than evidence before it.

37. The error that has occurred in this case can therefore be seen as more procedural than substantive. The Tribunal has not made an incorrect decision of fact on a matter raised by the parties. Rather, as part of the process leading to its decision, the Tribunal has led itself astray and based that decision on a false premise.

38. Fourth, application of the *Ladd v Marshall* principles potentially inhibits the inquisitorial jurisdiction and enabling role of the Upper Tribunal.

39. Again, the present case is a good example. The point on which the appeal has succeeded was not raised in the grounds of appeal. It was first identified by me when I considered the application for permission to appeal. The minimal knowledge of anatomy that I gained from sitting as a judge of the Social Entitlement Chamber—and from the social security and personal injury cases I had conduct of as a practising solicitor—led me to suspect that what the statement of reasons said about the distribution of the Median nerve might be mistaken. I therefore made further enquiries in the exercise of my own inquisitorial jurisdiction which confirmed that view sufficiently for me to conclude that the point had a realistic prospect of success.

40. I accept that making such enquiries in the first place would be going outside the proper judicial role if I were exercising an adversarial jurisdiction. But I am not. And in an inquisitorial jurisdiction it is standard practice for judges deciding applications for permission to appeal by claimants to consider whether there are grounds of appeal that would have realistic prospect of success, but which the applicant has not identified. The type of enquiry that I have made in this case—looking up an uncontested fact of anatomy in circumstances where an error about such a fact might also be an error of law—is no more than part of that process. Further, it was necessary in order to secure the overriding objective of dealing with this matter fairly and justly. The claimant is unrepresented and works as a cleaner. It would have been unrealistic for me to have invited her to research the point herself and inform the Upper Tribunal of the outcome of those researches.

41. And as it is legitimate for appellate judges exercising an inquisitorial jurisdiction to make such enquiries, they must, surely, be able to take the results of those enquiries into account without first satisfying themselves that the *Ladd v Marshall* principles are satisfied. Apart from anything else, the first principle makes no sense in that context.

Conclusions

42. My conclusions are therefore as follows.

43. I am bound by authority to accept that the *Ladd v Marshall* principles apply to the Upper Tribunal when the proceedings before it are adversarial. However, appeals against the decisions of the Social Entitlement Chamber are not adversarial.

44. Even though the point was not actually argued in the case, I also accept that *Hussain* (paragraphs 24 and 25 above) is strong persuasive authority that the *Ladd v Marshall* principles apply in inquisitorial proceedings when the question is whether new evidence should be admitted that relates to potentially contentious questions: in that case, opinion evidence expressing a medical judgment about how a diagnosed condition or a set of clinical findings might affect the ability of a claimant to undertake the normal activities of daily living.

45. In my judgment, however, the *Ladd v Marshall* principles do not apply where, in the exercise of an inquisitorial jurisdiction and enabling role—and/or in reliance on the expertise or experience of a specialist member—a tribunal misdirects itself as to an uncontentious and primary fact on which there was no evidence before it.

46. Making such an error is simply one of a number of ways in which a tribunal might fail to exercise its inquisitorial jurisdiction and enabling role correctly. The Upper Tribunal is entitled to raise the issue, and either party to the appeal is entitled to seek to prove that the Tribunal has gone astray, by the same mechanisms—including the provision of relevant additional evidence—as would be the case with any other procedural lapse.

47. By basing its decision in this appeal on the mistaken premise that the Median nerve does not supply the ring finger, the First-tier Tribunal failed to exercise its enabling role correctly. On the contrary, it hindered the proper presentation of the claimant's case by setting up an obstacle of which she was unaware and which had no basis in fact. I have therefore set its decision aside and remitted the matter to the First-tier Tribunal for re-hearing.

15 October 2020

Richard Poynter
Judge of the Upper Tribunal

Appendix
(Distribution of the Median, Radial and Ulnar Nerves in the hand: see paragraph 12 above)