[2020] UKUT 300 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CPIP/1313/2019**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

BF

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 18 June 2020
Decided on consideration of the papers

DECISION

The appeal to the Upper Tribunal succeeds.

The First-tier Tribunal made a legal mistake when it decided the claimant's appeal (ref. SC327/17/01413) at Ashford on 6 August 2018.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

DIRECTIONS

To the parties

1 I transfer this appeal to the Scotland, which is the region of the Social Entitlement Chamber in which the claimant now lives.

To the Secretary of State

2 The Secretary of State must provide the First-tier Tribunal with a replacement response to the appeal that includes details of the PIP activities and descriptors in accordance with the decision of Upper Tribunal Judge Rowland in *LH v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 57 (AAC) and does not include misleading and incorrect references to the relevant law (see my decision in *TM v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 204 (AAC)).

3 That alternative response must be sent to the Social Entitlement Chamber's Glasgow Appeals Service Centre so that it is *received* no late than one month from the date on which this decision is *sent* to the parties.

To the claimant

4 The Secretary of State's response to your appeal before the First-tier Tribunal did not comply with the law. I have directed the Secretary of State to provide you with one that does.

5 If you wish, you may reply in writing to that response. Any reply must be sent to the Social Entitlement Chamber's Glasgow Appeals Service Centre so that it is *received* no later than one month from the date on which the Secretary of State's response is *sent* to you.

6 If you decide you do not want to reply to the Secretary of State's response, please write to the Appeals Service Centre letting them know as soon as possible.

7 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 2 August 2017; and

(b) it can only consider evidence from after that date if it casts light on how you were on or before 2 August 2017.

If you decide to reply to the Secretary of State's new response, you should concentrate on the period on or before 2 August 2017.

8 I recommend that you should seek advice—and, if possible, representation—from a Law Centre, Citizen's Advice Bureau, local authority welfare rights unit, or other similar organisation. Do not wait until you have received the Secretary of State's response before looking for help.

9 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 6 August 2018 made a legal mistake, not because it has been accepted that you are entitled to PIP. Whether or not you are entitled will now be decided by the new tribunal. It will therefore be very much in your interests to attend the re-hearing.

To the First-tier Tribunal

10 After the Secretary of State has made a replacement response and the claimant has replied; or the claimant has said she does not wish to reply; or the time limit for replying has expired (whichever is sooner), a salaried judge must review the file and consider whether further case management directions are required.

11 The First-tier Tribunal must then 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.

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

13 The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge, medical member, or disability-qualified member who made the decision I have set aside. I recommend—but do not direct—that it should be chaired by a salaried, or formerly-salaried, judge.

14 The new tribunal may weigh the evidence of the face-to-face assessment—and, indeed, all the other evidence—as it sees fit. For the reasons given at paragraphs 13-23 of the *Reasons* below, it does not have to reject that evidence on the basis that no interpreter was present (although it may do so). However, if it considers that an interpreter was needed, and that none was present, that is a factor that must be taken into account in the assessment of the evidence. But it is only one factor and the new tribunal may conclude—it is a decision for it, not me—that it is outweighed by others. The Secretary of State has emphasised a number of such factors in her response to the Upper Tribunal and the hearing will give the claimant an opportunity to explain why he does not accept that significant weight should be attached to them.

15 If the new tribunal is asked to give a written statement of reasons, the history of the case to date means that the statement must explain in sufficient detail how it weighed the HCP report. That, of course, is in addition to setting out the new tribunal's findings of fact on all disputed issues and explaining its decision generally.

REASONS

Introduction

1. The claimant appeals with my permission against the above decision of the First-tier Tribunal.

2. As I have decided to remit the case, it is undesirable that I should set out the facts more than is necessary to explain my decision. To summarise, the Secretary of State awarded the claimant the standard rate of the daily living component of personal independence payment ("PIP"). The claimant's case is that he should be entitled to the mobility component as well and (possibly) that he should be entitled to the enhanced rate of the daily living component.

3. The First-tier Tribunal refused the claimant's appeal and confirmed the Secretary of State's decision.

Reasons for setting aside the First-tier Tribunal's decision

4. The legal mistake the Tribunal made in this case is the same as was made in *TM v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 204 (AAC) (although the Tribunal's decision was given before I issued my decision in *TM*).

5. As in that case, the Secretary of State's response to the appeal in the First-tier Tribunal:

(a) did not include details of the PIP descriptors (contrary to *LH v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 57 (AAC));

(b) instead directed the claimant to the *draft* Social Security (Personal Independence Payment) Regulations 2013, rather than those Regulations as made and amended; and

(c) further directed the claimant to the same generic internet search that was discussed in paragraphs 12-14 of my reasons for giving permission to appeal in *TM* (*i.e.*, as quoted under paragraph 4 of the final decision).

6. Therefore, for the reasons I gave in *TM,* I have set aside the Tribunal's decision in this case.

Reasons for remitting the case to the First-tier Tribunal

7. I have remitted the case to the First-tier Tribunal because the defects in the Secretary of State's submission meant that the claimant did not have proper notice of the legal case he had to meet in order to win his appeal. The findings made by the Tribunal cannot stand given the inadvertent unfairness that led to them, and it is inexpedient that I should make new findings.

8. Rather, justice requires that:

(a) the claimant should now be properly informed of that case; and have a fair opportunity to prepare his appeal; and that

(b) he should then have an opportunity to have his appeal considered by a new tribunal that includes a medical member and a disability-qualified tribunal member.

Reasons for the directions to the new Tribunal

9. The first point that my directions must cover is, of course, that the claimant and new tribunal should have the benefit of a fresh response from the Secretary of State that does not suffer from the defects identified in *TM*. I am informed by the Secretary of State's representative that the standard response to a PIP appeal has now been re-written, so I hope this will not present a problem.

10. However, my directions also have to cover a point that *is* problematic. As I explained when giving permission to appeal:

> "*The absence of an interpreter at the claimant's face-to-face consultation*
>
> 5. English is not the claimant's first language. He maintains that no interpreter was present, at his face-to-face consultation with the [PIP] health care professional …. The HCP's report does not mention the presence of an interpreter and, particularly given what I say at paragraph 16 below, I intend to proceed on the basis that no interpreter was present unless the Secretary of State presents evidence to the contrary.
>
> 6. It is therefore relevant to note that, in the claimant's recent employment and support allowance appeal (CE/1258/2018), Upper Tribunal Judge Perez stated as follows (among other things and omitting page references):
>
> > "Procedural irregularities
> >
> > *Procedural irregularities in the First-tier Tribunal proceedings*
> >
> > 11. The parties agree – and I find – that the First-tier Tribunal proceedings had the following procedural irregularities.
> >
> > *(1) No apparent interpreter for the HCP assessment*
> >
> > 12. There was an apparent failure to use an interpreter for the HCP assessment. The appellant had requested an interpreter for that assessment. That the appellant genuinely perceived the need for an interpreter, especially for the formal processes of the HCP assessment and tribunal proceedings, was evidenced by his use of an interpreter for his consultation with his haematologist. This failure was a

> procedural irregularity in conducting the HCP assessment and in producing the report based on that assessment. The First-tier Tribunal's reliance on that assessment are rendered irregular its own decision-making, by incorporating into it the flawed HCP procedure and/or by making a decision without having before it a document – the HCP report – produced using an interpreter.
>
> …
>
> 25. The First-tier Tribunal's procedural failings mentioned in [paragraph] 12 … were material errors of law."

11. That presents a problem in this case. If Judge Perez's view is correct then—as no interpreter was present for the PIP assessment either—I must direct the new tribunal that it would be procedurally irregular for it to rely on the HCP report: to the extent that its decision would *ipso facto* be set aside if it did so.

12. At the interlocutory stages of this appeal, I investigated whether the present appeal might be distinguishable from *CE/1258/2018* on the basis that the claimant had requested the presence of an interpreter in that case, but did not do so in this. When giving permission to appeal, I addressed that issue as follows:

> "**Did [the claimant] request an interpreter at the PIP face-to-face consultation?**
>
> 17. Finally, I should raise the possibility that Judge Perez's decision may be distinguishable on the facts. One part of her reasoning was that, in the case before her, [the claimant] had requested an interpreter but none had been provided.
>
> 18. I remain to be persuaded that such a request was made in this case. On 8 October 2019, I gave the following directions (among others):
>
> > "**Introduction**
> >
> > 1. These directions are given in [the claimant's] application for permission to appeal to the Upper Tribunal against the above decision of the First-tier Tribunal. Their purpose is to assist me to decide that application fairly and justly.

2. In [the claimant's] grounds of appeal dated 6 June 2019, he submits (among other things) that:

> "The Judge refers to such an HCP Assessment in his decision which is the base of his decision which contained factual inaccuracies, untruth information and was done without interpreter that I have asked for. The Assessor did not allow me to record the whole assessment that I have asked for in writing and over the phone."

3. I am unable to identify any request for an interpreter in the papers available to me.

4. In particular, page 36 of the Personal Independence Payment - How Your Disability Affects You ("Form PIP2") dated 1 May 2017 (page 178 of the First-tier Tribunal's bundle of papers), included the following passage:

> "**Coming to a face-to-face consultation**
>
> You'll be able to take someone with you. If you can't attend on the date given, you can contact the health professional to rearrange. The consultation will last about an hour, it's not a full physical examination, but the health professional will talk to you to understand how your health condition or disability affects your daily life.
>
> Tell us about any help you (or someone you bring with you) would need if you have to go for a face-to-face consultation."

There then follows a box in which the claimant can give the information requested in the last of the quoted paragraphs, which would include a request for an interpreter. It appears that [the claimant] left that box blank.

5. I therefore give the following directions.

To [the claimant]

The face-to-face consultation

> 6. You must (subject to Direction 7 below) write to the Upper Tribunal with copies of:
>
> (a) any document on which you rely in support of your submission that you asked for an interpreter to be present at the face-to-face consultation for the purposes of your claim for a personal independence payment, that took place on 23 June 2017;
>
> (b) the letter in which you asked to be permitted to record that consultation;
>
> (c) any contemporaneous written record(s) you may have of having asked by telephone to be permitted to record that consultation.
>
> 7. If it is your case that a copy of any of those documents is already included in the First-tier Tribunal's bundle of papers, then you may identify it by page number rather than providing a further copy."

19. [The claimant's] reply to those directions was a generalised assertion that:

> "I have always requested the presence of a Hungarian interpreter (for GP, Special Doctors, Tribunals and WCA) as I do not speak English well."

The reply does not deal with the specific evidence to which I had referred in the directions, and which tends to suggest that, whatever [the claimant's] usual practice may be, no such request was made on this occasion.

20. However, it does indirectly raise the possibility that [the claimant] might have requested an interpreter by telephone. I have therefore directed the Secretary of State to explore this possibility further before making her response."

13. In response to that direction, the Secretary of State's representative informs me that the 2017 telephone records of the company that carried out the assessment are no longer available for data protection reasons. It is therefore possible that the claimant did request an interpreter by telephone.

14. In those circumstances, the need for me to give clear directions to the new tribunal means I cannot avoid deciding whether—as the claimant asserts and the Secretary of State denies—what Judge Perez said in *CE/1258/2018* (as quoted in paragraph 10 above) was correct.

15. I have the misfortune to be unable to agree that it was.

16. A face-to-face consultation by an HCP for the purposes of a claim for PIP is an administrative process, not a judicial one. Although there is guidance from the Department for Work and Pensions as to how that process should be carried out, there are no written rules governing the procedure that the HCP must follow. Although I can quite see that a failure to use an interpreter where one is required is likely to reduce the value of the HCP's report, I respectfully disagree with Judge Perez that it amounts to a procedural irregularity, at least in the sense in which that phrase is used in rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules") and rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

17. And even if I am wrong about that—even if it were in some sense a procedural irregularity for a HCP to prepare a report without the benefit of an interpreter where the claimant has asked for one—I cannot accept Judge Perez's conclusion that reliance by the First-tier Tribunal on such a report renders its own decision-making irregular.

18. The procedures followed by the parties in the collection of evidence and the formal procedures followed by the First-tier Tribunal in accordance with the SEC Rules (which are made under the authority of Parliament) to reach a decision on that evidence are separate. The former (at least as regards the Secretary of State) are administrative procedures and the latter are judicial. Irregularities in the former procedures do not, without more, prevent the First-tier Tribunal from considering—and, if appropriate, relying on—the resulting evidence.

19. For example, in child support appeals the Tribunal often relies on evidence that has technically been stolen by one of the parties from the other. The test that is applied is not whether such evidence has been regularly obtained, but whether it is relevant to the issues the Tribunal has to decide and worthy of being accorded weight.

20. So it cannot be the law that by relying on a HCP report that has been prepared following an assessment at which an interpreter should have been present, but was not, the First-tier Tribunal incorporates the flawed HCP procedure into its own decision-making process and thereby makes that process irregular.

21. Rather, the assessment of a HCP report is a matter of fact, not of procedure. As such, the question of what weight should be attached to the report is a matter that—subject to the correct application of its own procedures—is within the exclusive jurisdiction of the First-tier Tribunal.

22. In my respectful judgment, to sustain Judge Perez's conclusion that—seemingly as a matter of law—the First-tier Tribunal cannot rely on a HCP report produced without an interpreter, it would be necessary to hold that the report was inadmissible. But the First-tier Tribunal is not subject to the formal rules of evidence, so questions of admissibility do not arise: see rule 15(2)(a) of the SEC Rules. All evidence that is potentially relevant is admissible unless the Tribunal takes the positive action of directing its exclusion under rule 15(2)(b). Unless such a direction is made, and absent irrationality, the Upper Tribunal cannot tell the First-tier Tribunal what weight it must attach to a HCP report, irrespective of the circumstances in which that report was compiled.

23. I have therefore directed the new Tribunal to approach the issue as set out in Directions 14-15 above.

Signed (on the original)
on 18 June 2020

Richard Poynter
Judge of the Upper Tribunal

Corrected on 2 November 2020, prior to publication on the website of the Administrative Appeals Chamber