[2021] UKUT 172 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CPIP/548/2020**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

PD

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 8 July 2021
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. SC947/19/00021) which was decided at Rochdale on 12 November 2019.

That decision is set aside and the case is remitted 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 new tribunal and that Direction 11 below includes a time limit.

DIRECTIONS

To the First-tier Tribunal

1 The judge who presided over the tribunal that made the decision I have set aside (and who is described as “Judge A” in the Reasons below) must have no further involvement whatsoever with any aspect of this case.

2 Further, the members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include any medical member or disability-qualified member who were members of Tribunals 1–4 (as further defined in the Reasons below).

3 The new 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.

4 In that respect, I direct the new tribunal that, whatever the position may have been when the appeal was first lodged, whether the claimant was properly entitled to personal independence payment from and including 16 April 2015 (the date from which that benefit was first awarded) has become an issue that is raised by the appeal.

5 However, the new tribunal may only supersede the decision of Tribunal 1 (which made that award of benefit) if it is satisfied that Tribunal 1’s decision was “made in ignorance of, or was based upon a mistake as to, some material fact”: see regulation 31(a) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 ("the 2013 Regulations").

6 For those purposes, a fact is “material” if it is a “primary” fact that would have made a difference had Tribunal 1 not been ignorant of, or mistaken as to, it. It is not sufficient that the new tribunal would not itself have awarded benefit on the facts that existed at the effective date of Tribunal 1’s decision. I observe that, in the absence of a written statement of reasons, the primary facts found by Tribunal 1 can only be ascertained by inference.

7 For the sake of completeness, I draw the new tribunal’s attention to section 10(5) and (6) of the Social Security Act 1998 and regulation 37 of the 2013 Regulations

which, taken together, fix the effective date of a decision that supersedes an earlier decision by a Tribunal.

To the claimant

8 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 12 November 2019 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.

9 In particular, I draw your attention to Directions 4-7 above. The new tribunal will be considering whether you were entitled to personal independence payment from and including 16 April 2015, the date from which you were first awarded it. It will not merely be considering whether that award should have ended from 12 September 2016.

10 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 28 August 2018; and

(b) it can only consider evidence from after that date if it casts light on how you were on or before 28 August 2018.

11 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 28 August 2018) you must now send it to HM Courts and Tribunals Service at Liverpool, quoting the reference, SC947/19/00021, so that it is *received* no later than **one month** from the date on which this decision is *sent* to the parties.

REASONS

Introduction

1. The claimant appeals with my permission against the above decision of the First-tier Tribunal. The Secretary of State’s representative supports the appeal.

2. I have allowed the appeal for substantially the same reasons that I set out when giving permission to appeal. Although I consider that the Tribunal applied the wrong legal test in relation to one aspect of the substantive law on entitlement to personal independence payment (PIP), the focus of my concern is on the irregular and unfair, procedure that the First-tier Tribunal adopted.

3. I will therefore begin by setting out the procedural history of the case.

Appeal 1 (SC946/15/02429)

4. In Appeal 1, on 28 October 2015, the First-tier Tribunal ("Tribunal 1") awarded the claimant the standard rates of the daily living component and mobility component of personal independence payment ("PIP") from 16 April 2015 to 15 April 2017.

5. It is unnecessary for me to give further details of Appeal 1, other to say that Tribunal 1 does not appear to have been asked to give a written statement of reasons for its decision. Certainly, no such statement is available to me.

Appeal 2 (SC947/16/01634)

6. On 12 September 2016, a decision maker acting on behalf of the Secretary of State superseded Tribunal 1's decision, so as to bring the award to an end from and including that date. I will refer to this decision as "the Superseding Decision".

7. The claimant asked for what is known as a "mandatory reconsideration" (technically, revision) of the Superseding Decision, but the Secretary of State did not change it.

8. The claimant then appealed to the First-tier Tribunal against the Superseding Decision. Her appeal was assigned the reference, SC947/16/01634 ("Appeal 2").

9. The appeal was eventually listed for a hearing on 21 June 2017 before Judge A, Dr B and Ms C. I will refer to that tribunal as "Tribunal 2".

10. On the claimant's application, the hearing on 21 June 2017 was adjourned, but Tribunal 2 took the opportunity to make directions, including:

(a) that the clerk should write to a named doctor (the one in whose name, the claimant was subsequently held to have issued forged documents) requesting copies of all the letters he had written to the claimant since 1 January 2015; and

(b) that the claimant could not withdraw the appeal without consent of Judge A or another judge (*i.e.*, under rule 17 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules")).

11. The restored hearing of Appeal 2 took place before Judge A, Dr D and Mr E on 16 March 2018 ("Tribunal 3"). The claimant did not attend and the Tribunal exercised its discretion to proceed in her absence.

12. Tribunal 3's decision was to refuse the appeal and confirm the Superseding Decision. The summary of reasons for that decision (at paragraph 5 of the decision notice) was in the following terms:

> "Whilst the tribunal accepts that the claimant has a personality disorder, the nature and extent of the resulting limitations are insufficient to score the required number of points and as a result the claimant does not qualify for either component of Personal Independence Payment. In reaching its decision the tribunal placed particular reliance upon the evidence of certain documentation from the NHS. The Tribunal found, on a balance of probabilities, that the appellant had produced documents from health care professional[s] which had not been written by health care professionals".

13. In its written statement of reasons, Tribunal 3 noted at [9] that:

> "… a previous tribunal had concluded that the appellant had forged documentation"

in an appeal relating to disability living allowance. That was also Tribunal 3's conclusion and it gave a detailed explanation for reaching that conclusion at [40] to [61]. Its assessment of the claimant (at [66]) was therefore that she was:

> "… a dishonest witness who had manufactured documents in order to obtain disability benefits. This was not isolated but over a sustained period of time. As such she was inherently lacking in candour as a witness."

and (at [68]) that she had:

> "… produced documentation which is forged. It is of note that this is not the first time that she has been subject to this particular finding. As a result, and in the light of the fact that she has produced documentation from the surgery which was closed in 2016, we conclude that grounds for supersession are established. It is of note that the supersession decision expressly referred to documents which we have found to be forged…. We have found documents to be forged which date back to

> 2013. That is very much in keeping with the conclusions of the tribunal in 2015. Given this fraud we consider that grounds for supersession are established. In particular we note what was said by Lord Hope and Baroness Hale that the role of the FtT is to *"ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled"*. In this appeal public interest is plainly satisfied as the tribunal has persuasive evidence that an individual is obtaining benefits as a result of fraudulent misrepresentations that have been manufactured for that purpose.

14. Tribunal 3 concluded (at [69]):

> "Based upon the above we were satisfied that the appellant was never entitled to personal independence payment and that grounds for supersession are satisfied."

15. The claimant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal against Tribunal 3's decision. On 24 April 2018, Judge A refused permission and the Upper Tribunal's records confirm that the application was not renewed.

Appeal 3 (SC947/19/00021)

16. The claimant then made a fresh claim for PIP with effect from 10 May 2018. On 26 July 2017, she attended a face-to-face consultation with a health care professional, who recommended to the Secretary of State that the claimant did not satisfy any of the scoring descriptors.

17. On 28 August 2018, a decision maker acting on behalf of the Secretary of State accepted that advice and refused the claim.

18. On 4 December 2018, that refusal was confirmed on mandatory reconsideration.

19. On 31 December 2018, the First-tier Tribunal received the claimant's appeal and it was allocated the reference SC947/19/00021 ("Appeal 3").

20. On 1 March 2019, the Appeal 3 came before Judge A for case management. He gave the following directions:

> "1. The appellant appeals a decision reached on 28 August 2018. She relies upon a considerable amount of medical documentation including letters from a psychiatrist [*Name*].

Direction to HMCTS

2. I dealt with the appellant's appeal in [Appeal 2]. This appeal was dismissed and permission to appeal was sought from the Upper Tribunal. HMCTS are to confirm with the Upper Tribunal what the status of this appeal is and obtain any copies from the Upper Tribunal of decision notices which have been reached.

3. Until such time that it is clear that UKUT resolved that [Judge A] erred in law in respect of the above appeal, it is proportionate and in the interests of justice that this appeal stays with [Judge A].

4. Reserved to [Judge A].

Direction to DWP

5. In [Appeal 2], I found that the appellant was not only a witness who lacked credibility but was a witness who had (on a balance of probabilities) manufactured medical evidence in support of her appeal.

6. The SSWP are [*sic*] to consider the statement of reasons issued in that decision and are to assign a presenting officer to this appeal.

7. Further submissions on this point can be made.

Direction to the appellant

8. The appellant cannot withdraw the appeal without permission of [Judge A] and/or another [judge] pursuant to rule 17."

21. On 8 July 2019, the Appeal 3 came before Judge A again and he gave the following directions:

"1. The appellant appeals a decision in respect of PIP. She has lodged a substantial bundle of documents. I have previously heard this appeal in March 2018. That decision concluded that the appellant was dishonest and that she had lodged forged documents in support of her claim…. Many of those documents are contained within the appellant's bundle in respect of the current appeal.

2. That decision and statement of reasons was appealed and I refused PTA. Upper Tribunal records indicate that the appellant did not lodge any onward rights of appeal. As such this is a final determination which stands undisturbed.

> 3. I direct as follows: –
>
> a. HMCTS should attach this decision notice at the front of all bundles are sent out to panel members. This will save significant time as tribunal members will be able to ignore much of the information set out within the bundle.
>
> b. The FTT may elect to ignore any evidence which pre-dates 16 March 2018 (which was the date that the last FTT convened) and upon which significant judicial time has already been spent determining fraud.
>
> c. The FTT will need to consider what weight it gives to documentation which post-dates 16 March 2018. The starred immigration decision of **Devaseelan** may assist in this regard ….
>
> d. This appeal was going to be listed before the same panel who had previously heard the appeal. Given the fact that the findings are not contaminated with any error of law this was deemed an appropriate use of FTT time. However, [Mr E] is unavailable until November 2019 and as such these directions were issued.
>
> e. Exclude [Judge A], [Dr D] and [Mr E] (solely on the basis that the entire panel cannot be reconvened until November 2019).
>
> f. If, it transpires that the matter will not be listed until November 2019, then HMCTS should list it with myself and the previous panel."

It is convenient to note at this point that Judge A had not "previously heard this appeal" in March 2018. Appeal 3 involved the same claimant and benefit as Appeal 2, but related to a different decision, on a different claim, in relation to a different period. In short, Appeal 3 was not a rehearing of Appeal 2.

22. It must have transpired that Appeal 3 could not be listed before November because Appeal 2 came before a tribunal consisting of Judge A, Dr D and Mr E on 12 November 2019. I will refer to this tribunal as "Tribunal 4": its members were the same as the members of Tribunal 3, but—as noted above—it was a separate tribunal deciding a different appeal.

23. On 12 November 2019 the claimant attended and gave evidence through an interpreter. Tribunal 4 refused the appeal and confirmed the Secretary of State's decision that the claimant was not entitled to any rate of PIP from and including 10 May 2019.

24. In the written statement of reasons for Tribunal 4's decision, Judge A recited the procedural history of the claimant's PIP appeals and summarised the directions he had given on 8 July 2019. He then discussed the case law on whether it amounted to unlawful bias for holders of judicial office to sit again in cases in which they had commented adversely on a party or found that party's evidence to be unreliable. He noted that because of the way the claimant had presented her case, it had not been necessary for Tribunal 3 to consider the application of the decision in *Devaseelan.*

The errors in Tribunal 3's decision

25. Tribunal 3's decision contained at least two material errors of law. Had the claimant renewed her challenge to it before the Upper Tribunal, I do not see how it could have survived.

26. I do not want the previous paragraph to be misunderstood. Tribunal 3's decision is not before the Upper Tribunal and the claimant did not in fact appeal against it. In the absence of an application for permission to appeal out of time, I have no jurisdiction over it. For the reasons I give below, the "outcome" decision that the claimant was not entitled to PIP from and including 12 September 2016 is final even if it is wrong. Nothing that is decided in this appeal can change that situation from any date before 10 May 2018, the effective date of the claimant's new claim.

27. However, the errors in Tribunal 3's decision are relevant to the current appeal. The composition of the Tribunal was the same in both cases and the effect of the directions given on 1 March 2019 and (in particular) on 8 July 2019 was that Tribunal 4 treated the proceedings before it as a sort of epilogue or postscript to the proceedings before Tribunal 3. I judge that the errors in the Tribunal 3's procedures and substantive decision have been carried over into the procedures and decision of Tribunal 4.

28. For that reason only, I record my views as follows.

Basis on which risk of harm is assessed.

29. Paragraph 20 of the written statement of reasons for Tribunal 3's decision is as follows:

> "20. The correct focus for decision makers is the likelihood of a harmful event occurring and not the degree of harm likely to be caused if it does. In **CE v [SSWP] (PIP)** [2015] UKUT 643 (AAC), UTJ Hemingway considered the likely after effects arising from nocturnal epileptic seizures. The Claimant in that case suffered fits for at least 50% of nights which affected her ability to perform activities the following day due to tiredness. Her inability to

> perform tasks such as cooking etc arose as a direct causal link to the seizures the night before and as such she satisfied the relevant descriptors."

30. The paragraph is puzzling because the description of the facts in, and *ratio* of, the *CE* case in the second, third and fourth sentences does not appear to provide a basis for the proposition of law asserted in the first sentence.

31. Nevertheless, *CE* is authority for the proposition that a remote risk of serious harm is not a factor to be considered when assessing whether an activity can be performed "safely" within the meaning of Regulation 4 (2A) of the PIP regulations. Judge Hemingway noted that "safely" was defined as meaning:

> "… in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity",

and continued:

> "29. It seems to me that the F-tT's approach [which had involved balancing the likelihood of a danger occurring with the degree of harm that would ensue if it did] would certainly make a great deal of sense if the word "safely" had not been defined. That is because it seems logical to suppose the word, unclarified by a definition, would require a consideration not only of the likelihood of a risk occurring but also of the potential harm which might be caused. If an event was unlikely to occur whilst a task was being performed but, if it did, might result in only relatively trivial injury at worst, then it might be thought that task could safely be undertaken but not so if the nature of the harm caused would be substantial. However, the word is defined as noted above and in the way set out above. That definition focuses upon the likelihood of harm being caused as opposed to the gravity of any harm if it is caused. Thus, on the face of it, a narrow definition has been adopted which would not regard something as being unsafe even if the consequences might be very serious or even fatal."

32. The problem with Tribunal 3 having adopted that approach is that on, 9 March 2017—more than a year before Tribunal 3 gave its decision—*CE* had been disapproved by the reported decision of a three-judge panel in *RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 105 (AAC), [2017] AACR 32. To quote the head note of the reported version of that decision:

> "2. an assessment under paragraph 4(2A)(a) of the PIP Regulations that an activity cannot be carried out safely did not require that the occurrence of harm was "more likely than not", a tribunal must consider whether there was a real possibility that could not be ignored of harm occurring, having regard to the nature and gravity of the feared harm in

> the particular case. Both the likelihood of the harm occurring and the severity of the consequences were relevant …".

33. The First-tier Tribunal is bound to follow decisions of a three-judge panel over those of a single judge of the Upper Tribunal: see *R(I) 12/75* and *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at [37]. It was therefore an error of law for Tribunal 3 to have followed *CE* and to have overlooked *RJ, GMcL and CS*.

Grounds for supersession

34. It is notable that, having found that the Secretary of State did not deal with supersession correctly, Tribunal 3 did not identify a specific ground for supersession either. As noted at paragraph 14 above, it merely said that the grounds for supersession were satisfied given the claimant's fraud and that

> "Based upon the above we were satisfied that the appellant was never entitled to personal independence payment and that grounds for supersession are satisfied."

35. But, even accepting for the purposes of argument that the claimant had been fraudulent, it did not follow that the original decision fell to be superseded. The fraud might have been directed to an aspect of her claim that the claimant thought was relevant, but was not. Or there might have been sufficient other evidence to support the original award of benefit even if the claimant's evidence had been disregarded.

36. Further—although I do not suggest that it would diminish her responsibility for any criminal offences she may have committed—it was possible that the way in which the claimant conducted the proceedings was symptomatic of the personality disorder from which she had been diagnosed and, to that limited extent, was a factor in her favour.

37. Tribunal 3 should therefore have identified the regulation that it considered conferred the power to supersede in this case. Had it done so, it would have correctly identified the effective date of the superseding decision it was making.

38. The key to the Tribunal's error was the finding that the claimant had never been entitled to PIP. Given that finding, Tribunal 3 ought to have asked itself why it was only taking away her entitlement from 12 September 2016 rather than from 16 April 2015, the date from which it was first awarded.

39. As the original award of PIP had been made by a Tribunal, it was not possible for the Secretary of State to revise it. And as tribunals stand in the shoes of the Secretary of State, neither could Tribunal 3.

40. Decisions of tribunals about PIP can, however, be superseded if:

(a) there has been a change of circumstance (see regulation 23 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013);

(b) the Secretary of State has received new medical evidence (regulation 26);

(c) the "loss of benefit" provisions of the Social Security Fraud Act 2001 apply (regulation 28);

(d) they were made under section 26(4)(b) of the Social Security Act 1998, which relate to "lookalike" appeals (regulation 31(b)); or

(e) they were made in ignorance of, or based upon a mistake as to, some material fact (regulation 31(a)).

41. This, of course, was a case in which the Secretary of State had received new medical evidence and, on the evidence accepted by the Tribunal, she was not entitled to PIP, so the case fell within regulation 26.

42. However, the finding that the claimant had *never* been entitled to PIP implied that Tribunal 3 had concluded that Tribunal 1 had been ignorant of, or mistaken as to, something material. In which case, regulation 31(a) also applied and was arguably the more appropriate basis on which to supersede. Under regulation 37(1) and (2)(b), the effective date of such a superseding decision should have been the date on which Tribunal 1's decision took effect, namely 16 April 2015.

43. Of course, it would not have been possible for Tribunal 3 to have taken away the claimant's PIP without adjourning and warning her that it was considering whether to take that step. But, having reached the conclusion that she had never been entitled to benefit, that—for the very reasons given at paragraph 22 of its statement of reasons—is what it should have done.

Composition of Tribunal 3

44. In my judgment, Judge A should not have been a member of Tribunal 3 in the first place.

45. That is because he had been a member of Tribunal 2 which adjourned and the composition of Tribunal 3 was not exactly the same as that of Tribunal 2.

46. In *SW v Secretary of State for Work and Pensions (ESA) [2019] UKUT 415 (AAC)*, Upper Tribunal Judge Levenson held that, following an adjournment, an appeal must be heard either by exactly the same tribunal or a completely different one. He stated:

> "Where a judge has discussed the facts with one panel member who is not on the final panel … but actually makes a decision after discussion with a different panel member … then, in the absence of clear evidence to the contrary, it cannot be excluded from possibility that the judge remains influenced by views expressed by the member who did not sit on the final panel, and this is a breach of fair procedure. It would have been different had no discussion of the facts taken place at the first hearing."

It is notable that both the decision to adjourn and the decision on the substantive appeal in SW were made without a hearing. However, Judge Levenson set aside the latter decision even though the first tribunal had not heard oral evidence and both decisions were made on the papers.

47. The decision of Upper Tribunal Judge Jacobs in *JH v Secretary of State for Work and Pensions and MH* [2016] UKUT 158 (AAC) deals with similar issues. The first paragraph of the reasons for that decision reads as follows:

> "1. The Social Security Commissioners warned almost 30 years ago of the dangers of one member of a tribunal having knowledge of evidence that was not shared by all the members. The danger is particularly acute for the First-tier Tribunal as it is the primary fact-finding tribunal. Knowledge of the whole of the evidence is essential for sound fact-finding. As the Commissioners said in *R(U) 3/88*:
>
> > 7. … The members are judges of fact at the hearing and it seems to us undesirable for a member to have a residual knowledge of evidence given at an earlier hearing that is not shared by the other members - knowledge of what was said as distinct from what was written down. There is, also, the danger of the member becoming judge and witness if a conflict arises as to what was said at the earlier hearing. …
>
> That practice is precautionary and based on the risk involved; later in the paragraph the Commissioners described this (and other procedures they discussed) as 'safeguards'. It does not involve an investigation whether any member of the tribunal possessed residual knowledge or, if so, whether it would have affected the outcome. The mere possibility is sufficient."

48. There is a clear tension between what Judge Levenson decided in *SW* and what the Tribunal of Commissioners decided in *R(U) 3/88.*

49. *R(U) 3/88* and *JH* only exclude members of the judiciary from participating in a future, differently constituted, tribunal if they have "knowledge of evidence given at an earlier hearing".

50. *SW*, on the other hand, excludes them if they have discussed the issues with another member of the judiciary (at least where such discussion takes place on an occasion when the case has been formally listed).

51. Further, *SW* has been the subject of academic criticism for going beyond what was said in *R(U) 3/88*. In particular, the learned editors of Volume III of *Social Security Legislation 2020/21* (ed. Rowland and Ward, Sweet and Maxwell, London) at pp.1591-2. prefer the approach in the latter decision.

52. That preference relies in part on the decision of the Upper Tribunal in *Midland Container Logistics Ltd* [2020] UKUT 5 (AAC) on appeal from the decisions of two Traffic Commissioners. In one of those appeals, the Traffic Commissioner informed the appellants at the end of the public enquiry that

> "prior to coming to his decision, he was going to "*have a word with my colleague in Bristol first of all because.. this is a relatively new type of offence.. of which there is little case law and the Traffic Commissioners, only in the last two or three months, have started to deal with it... And we are all anxious, or keen, that operators are treated consistently around the country … [The Bristol Traffic Commissioner] has dealt with a case which is outwardly similar, …. But there are some differences.. now I know more about this case I think I am better able to chat over with him the differences between the two cases*": the italicisation is original, see [45(e)].

Counsel for the appellants did not object to the Traffic Commissioner's proposal at the hearing. However, when the case came before the Upper Tribunal, the appellants submitted that, nevertheless, any information that the Traffic Commissioner obtained during such a discussion and which had influenced his decision should have been conveyed to the operators to allow them to respond.

53. The Tribunal rejected that submission.

> "50. Turning now to the criticism made of [the Traffic Commissioner's] stated intention to consult with [the Bristol Traffic Commissioner] prior to coming to a final decision in the case of MCL and without informing MCL of the content of that discussion, we first of all repeat that this was not objected to when it was raised at the end of the public inquiry. But *in any event, there is no procedural unfairness or lack of transparency in two or more judicial office holders considering together how to approach a particular issue so as to ensure consistency*, particularly when, as in

> these cases, the issues to be determined are new ones (i.e. the use of emulators). Neither are TCs required to inform operators of the content of such discussions. The real issue is whether the ultimate decisions were either wrong in law or on the facts or disproportionate or whether there has been some other procedural unfairness. The fact that the ultimate outcome of both decisions were different (revocation in one instance and curtailment in the other) is indicative of the fact that each case was determined on its own facts …" (added emphasis).

54. In the light of that passage, the learned editors state:

> "It is suggested that the former approach is to be preferred and that it is no more unfair for a judge to discuss a case with a colleague than it is for a judge to carry out legal research in a text book, provided that, if a new point occurs to the judge as a result of the discussions, the parties are given an opportunity to comment on it. Where a case is adjourned after oral evidence has been given, it is necessary for a panel to have the same composition or be entirely differently composed, but that is not because the panel will have discussed the case among themselves but because if, say, the judge then sits with a different member on another occasion, he or she may be influenced by having heard evidence that the other member has not heard (*R(U) 3/88; CDLA/2429/2004*). All the members of the tribunal should determine the case on the basis of the same evidence. There is no contravention of that principle if the first consideration of the case was entirely on the papers, as it was in *SW*."

55. In this case, the claimant did not attend the hearing before Tribunal 2, so Judge A did not have "knowledge of what was said as distinct from what was written down" within *R(U) 3/88* and *JH*.

56. Equally, there can be no doubt that the members of Tribunal 2 discussed the issues in the first appeal. That Tribunal's direction—and it was given the by tribunal as a whole and not by Judge A on his own—that the doctor who was the supposed source of the evidence that Tribunal 3 subsequently decided to be forged should be approached shows that Tribunal 2 had formed the view that the *bona fides* of that evidence was questionable. That view could not have been formed without discussion of the issues. If *SW* is correctly decided, that would be sufficient to exclude Judge A from sitting again unless he did so with both Dr B and Ms C.

57. In my judgment, however, there is an additional factor in this case which places it in an interstice between *SW* and *R(U) 3/88*. Dr B, who was a member of Tribunal 2, had previously examined the claimant. Therefore, the risk that Judge A "remain[ed] influenced by views expressed by [a] member who did not sit on the final panel" potentially represented a greater breach of fair procedure than occurred in *SW* because Dr B's views were likely to have been influenced by both the written material (which was

available to Tribunal 3) and his memories of having examined the claimant (which would not have been).

58. Given those facts—and even though it goes beyond what was decided in *R(U) 3/*88—I am not prepared to hold that *SW* is wrongly decided.

59. In my judgment, whether it is "unfair for a judge to discuss a case with a colleague" will depend on what is said.

60. If the discussion is of a purely legal point, then I agree that it is "no more unfair … than it is … to carry out legal research in a text book".

61. If however, the conversation involves one member of the judiciary alerting another to the existence of relevant evidence of which the former has knowledge that was not gained in the current proceedings, then there is a risk of unfairness that brings the case within the spirit of *R(U) 3/88* and should, in my judgment, lead to the appeal being heard by a differently constituted tribunal.

62. Moreover, the outcome reached by Judge Levenson in *SW* also follows, albeit via different reasoning, from the majority decision of a three-judge panel of the Upper Tribunal in *MB and others v Secretary of State for Work and Pensions (ESA and DLA)* [2013] UKUT 111 (AAC); [2014] AACR 1 (see the decision of Upper Tribunal Judge Wright in *GO and HO v Barnsley Metropolitan Borough Council (SEN)* [2015] UKUT 184 (AAC) at [43] to [54]). I respectfully consider *GO* to have been correctly decided, notwithstanding the slightly dismissive treatment it received in *JH* at [5].

63. Finally, the context in which decisions are made by Traffic Commissioners and the Social Entitlement Chamber of the First-tier Tribunal are different, so it may be that the decisions in *SW* and *Midland Container Logistics* can be distinguished. However, if forced to a decision, I would, as presently advised, follow the former rather than the latter.

64. Therefore, even though Tribunal 2 only adjourned because Dr B had (correctly) recused himself, Judge A and Ms C were also ineligible to sit on Tribunal 3.

The "no-withdrawal" direction

65. It is also necessary to comment on Tribunal 2's direction of 21 June 2017 under rule 17(3)(b) of the SEC Rules preventing the claimant from withdrawing the appeal without first obtaining permission from a judge.

66. My understanding is that the primary function of such a direction was originally to compensate for the lack of a cross-appeal procedure in multi-party social security and child support appeals. The second respondent in such appeals may wish to argue that the appeal should be allowed on a basis that is less favourable to the appellant than the original decision was. A direction under rule 17 prevented the appellant from avoiding that outcome by withdrawing the appeal.

67. That function is now less important because, from 21 August 2015, that state of affairs is also prevented by the amendment to rule 17(4) by Tribunal Procedure (Amendment) Rules 2015 (SI 2015/1510), which allows a respondent to apply for a withdrawn appeal to be reinstated.

68. I do not, however, say that the primary function was the only function of a rule 17(3)(b) direction. The Secretary of State's representative has referred me to the decision of Upper Tribunal Judge Knowles QC (as she then was) in *WM v Secretary for Work and Pensions (DLA)* [2015] UKUT 642 (AAC) in which she stated (at [37]) that the power in rule 17(3)(b) can be used to prevent an appellant from withdrawing an appeal (or part of it) in circumstances where the tribunal is proposing to make a decision that is less favourable to the claimant than the decision under appeal or (at [39]) generally to prevent withdrawal of an appeal that is part-heard.

69. I accept that the power conferred by rule 17(3)(b) is not confined to multi-party appeals. It is not uncommon for cases to arise before the Social Entitlement Chamber in which an unrepresented claimant who fails to understand the real issues raised by her case is insistent on withdrawing an appeal that she is likely to win in circumstances where withdrawal will be to her financial disadvantage. The inquisitorial jurisdiction exercised by the Chamber is inherently more paternalistic than the adversarial jurisdictions that operate elsewhere in the judicial system and I have known rule 17(3)(b) to be exercised in a two-party appeal to protect such a claimant from herself.

70. I also accept that, where appropriate, the power can be exercised in the circumstances envisaged by Judge Knowles. But, in my judgment, it will be rare that it is appropriate to do so; particularly now that a respondent may apply for reinstatement (which was not the case under the law that Judge Knowles was considering in *WM*).

71. On the contrary, the considerable pressure on judicial resources and the resulting increase in the waiting times for other claimants, favours allowing appellants who make an informed decision to withdraw their appeals to do so with a minimum of formality.

72. As far as giving a direction simply because an appeal has gone part-heard is concerned, why should a claimant who, having attended a hearing, realises for the first time that her appeal lacks merit, have obstacles placed in her way if she wishes to withdraw it?

73. And the suggestion that a tribunal should make a rule 17(3)(b) direction if it warns an appellant that it is contemplating reducing or removing an existing award is surprising. As I understand the law, one of the reasons—if not the main reason—that tribunals are required to give such a warning is to allow the claimant an opportunity to withdraw if so advised: see *e.g.*, the decision of a Tribunal of Commissioners in *R(IB) 2/04* (at [94]) and the discussion by Mr Commissioner Rowland (as he then was) in *CDLA/884/2008*.

74. In any event, withdrawal by the claimant will not necessarily protect the existing award. If the Tribunal's doubts about that award are well-founded, there will usually be grounds on which the decision can be revised under regulation 9(b) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013. And in cases where there are no such grounds, but the Secretary of State nevertheless wishes to pursue the matter, she may—as I have explained above—apply to have the withdrawn appeal reinstated.

75. Be that as it may, I am unable to discern any legitimate reason for giving a rule 17(3)(b) direction in this case.

76. The Superseding Decision (which is what Tribunal 2 was considering) terminated the claimant's award of benefit. Unless the Tribunal was proposing to supersede Tribunal 1's decision for ignorance or error of fact (which, given its decision, it obviously was not), there was nothing for it to take away from the claimant; no reason to give a warning; and no warning was in fact given.

77. Unfortunately, I am driven to the conclusion that, if there was any reason for giving the direction at all, it must have been to deny the claimant an opportunity to avoid the scolding she was given in the statement of reasons for having, as Tribunal 3 found, forged documents in support of her appeal.

78. And if that was the reason, then the direction was improper.

79. The First-tier Tribunal will inevitably encounter forgery or other types of dishonesty from time to time. When it does, it must say so to the extent necessary to explain its decision. For example, it will have to explain why it has rejected the forged evidence and it may also be necessary to explain how that rejection affects its judgment of the claimant's credibility (always remembering that a party to an appeal who is lying about something is not necessarily lying about everything).

80. But it does not follow that a claimant who is suspected of dishonesty should be prevented from withdrawing an appeal she no longer wishes to pursue: on the contrary,

if the suspicions are correct, the sooner such a claimant desists from perverting the course of justice by prosecuting an appeal on the basis of manufactured evidence, the better.

81. The role of the Social Entitlement Chamber in social security appeals is to make decisions about entitlement to benefit. Any obligation it may have to detect fraud is ancillary to that role. Except, possibly, in civil penalty appeals, it is not under any obligation to punish or deter fraud. Other institutions exist for that and judges who wish to do so can always bring the facts of an appeal to the attention of the relevant authorities.

82. It is not, however, a proper and judicial exercise of the rule 17(3)(b) power for a tribunal to force a claimant who is suspected of fraud to see an appeal through to the end merely so that the tribunal should have an opportunity to reprove behaviour that it has no power to punish.

Errors in Tribunal 4's decision

Procedural errors

83. I acknowledge that—subject to what is said above about the decision in *SW*—having sat on the tribunal that decided Appeal 2 would not normally have prevented Judge A from sitting as a member of the tribunal that decided Appeal 3. As I have said, Appeal 3 was a different appeal.

84. However, in the circumstances of this case—and in particular the strong link between the two appeals that was brought into existence by the directions Judge A gave on 1 March and 8 July 2019—it was in my judgment also a breach of fair procedure for Judge A to have sat as a member of Tribunal 4.

85. More importantly, Tribunal 4 erred in law as a result of Judge A's directions of 8 July 2019, which—at least as regards the claimant: see paragraph 95(e) below—had the effect of treating everything decided by Tribunal 3 as a "done deal" for the purposes of anything Tribunal 4 had to decide.

86. That was an error of law. Section 17 of the Social Security Act 1998 reads as follows:

> "**Finality of decisions**
>
> **17.**—(1) Subject to the provisions of this Chapter and to any provision made by or under Chapter 2 of Part 1 of the Tribunals, Courts and

> Enforcement Act 2007, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulations under section 11 above, any decision made in accordance with those regulations shall be final.
>
> (2) If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of—
>
> (a) further such decisions;
>
> (b) decisions made under the Child Support Act; and
>
> (c) decisions made under the Vaccine Damage Payments Act."

87. Thus the section draws a clear distinction between a "decision", which—without more, but subject as stated—is final under subsection (1), and "a finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based" which—by subsection (2)—is only conclusive "if and to the extent that regulations so provide".

88. Although such regulations have been made, none of them applies in the circumstances of this appeal.

89. In other words, the normal principles of what lawyers call issue estoppel or *res judicata* do not usually apply in social security appeals.

90. To put that in slightly plainer English, what is final is a tribunal's "outcome decision": that is, the final decision saying that a claimant is entitled to a benefit at a specified rate for a specified period or is not entitled from a specified date.

91. But nothing apart from the outcome decision is final unless regulations say so. That includes all the findings of facts, determinations of issues, and reasoning that underlie the outcome decision: those are just building blocks leading to the final decision, not the decision itself.

92. Applying those principles to this appeal, Tribunal 4, however constituted, was bound by Tribunal 3's outcome decision that the claimant was not entitled to PIP from and including 12 September 2016. But, even if identically constituted, it was *not* bound by anything else that Tribunal 3 had decided. It was irrelevant that Tribunal 3's decision had not been held to be in error of law because, for the purposes of her entitlement to

PIP from 10 May 2018, the claimant was entitled to challenge what that tribunal had decided about the *facts.*

93. Specifically, it was open to the claimant to rely on evidence that had been before Tribunal 3 but argue that Tribunal 4 should interpret it differently and (had she wished to do so) to challenge the findings of forgery and fraud.

94. Moreover, the claimant was entitled to make those arguments to a tribunal, the members of which had an open mind about whether the findings and reasoning of Tribunal 3 had been correct and who had prepared properly for the hearing by reading all the evidence before it began.

95. For those reasons, Judge A's directions of 8 July 2019 represent a breach of the Tribunal's duty to act fairly towards the claimant:

(a) The directions show that Judge A did not sufficiently appreciate that—although each member of a multi-member tribunal will bring particular skills to the task—all are equal judges of fact and law. Judge A repeatedly writes (not merely in those directions but elsewhere) that "I" heard, or decided, or reached certain conclusions in Appeal 2. He did not. The hearing was before, and the decision and conclusions were reached by, Tribunal 3 *as a whole*. The same should have been true of Tribunal 4. It was not open to Judge A to tell the members of Tribunal 4—and, indeed, the judge who was to preside over that tribunal, because at the time the directions were given, it was anticipated that the membership of Tribunal 4 would be different from Tribunal 3—that they should ignore, or that they might choose to ignore, relevant evidence in the appeal bundle.

(b) The directions have the effect that (again, at least as regards the claimant) Tribunal 3's decision was to be treated as done and dusted in every respect and that Tribunal 4 was only concerned with evidence that had been produced subsequently. For the reasons given above, that was incorrect.

(c) By the reference to *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702, the directions even go so far as to suggest that any evidence produced after Tribunal 3's decision should be assessed in the light of that decision. The reference to *Devaseelan* was a source of potential error. It was a decision from an adversarial jurisdiction as opposed to an inquisitorial one (see *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552 at [34] and [42]). Moreover, it concerned an area of law which contains nothing equivalent to section 17(2) of the Social Security Act 1998 and in which normal principles of issue estoppel and *res judicata* are therefore likely to have a greater influence in successive proceedings. It was, in any event, unnecessary for Judge A to look for authority in immigration law when there are social security authorities that were

binding on him: see *e.g.*, *Secretary of State for Work and Pensions v AM (IS)* [2010] UKUT 428 (AAC) at [42 *et seq*.].

(d) At paragraph 8 of the written statement of reasons for Tribunal 4's decision, Judge A stated:

> "8. It should also be noted that the starred IAC decision of **Devaseelan** had been flagged up as possibly having some note. This is an IAC decision which considers what propositions should follow in respect of a re-hearing of matters already determined by the FtT. It would, in our judgment, have been of relevance if the appellant had attempted to re-argue matters which preceded the extent appeal. However, given the shift in the appellant's presentation of facts and condition, this was not an avenue that the FtT needed to consider."

It is unsurprising that the claimant did not attempt to re-argue matters that had been before Tribunal 3: Judge A 's directions had effectively told her that she would be ignored if she attempted to do so.

(e) By contrast, paragraphs 5-7 of the directions given by Judge A on 1 March 2019, that were addressed solely to the Secretary of State, expressly permitted her—I should perhaps say "invited" her—to make further submissions on matters that had been before Tribunal 3. It was unfair to the claimant—and a shocking breach of the Tribunal's duty of impartiality—to have given such directions when the claimant had effectively been denied the same opportunity.

96. Finally, as regards procedural errors, the direction under rule 17(3)(b) of the SEC Rules that Judge A gave on 1 March 2019 is open to the same objections that are made at paragraphs 65 - 82 above in relation to the similar direction given by Tribunal 2

Substantive errors

97. Finally, the link forged by Judge A's directions between what had been decided by Tribunal 3 and what was open for discussion before Tribunal 4 inevitably had the effect that Tribunal 4's decision is undermined by the substantive error in Tribunal 3's decision (*i.e.*, as to the basis on which the risk of harm is assessed) that I discuss at paragraphs 29-33 above.

Disposal of appeal

98. For all those reasons, Tribunal 4's decision involved the making of errors on points of law. There is no question that I must exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set it aside.

99. Having done so, I must next decide whether to re-make the decision myself or to remit the matter to the First-tier Tribunal with directions.

100. I have chosen to take the latter course.

101. There is evidence that would have entitled Tribunal 4 to reach the decision it did (even if it had not mistaken the law about the basis on which risk is assessed). But, given the procedural history, justice now requires that all the evidence should be reconsidered by a fact-finding tribunal that is prepared to approach that task in a judicial and dispassionate manner, with proper impartiality, having read all the papers, and on the basis that it is not bound by Tribunal 3's findings of fact and reasoning (although it may, of course, arrive at similar conclusions in the exercise of its own independent judgment).

102. For those reasons, my decision is as set out on page 1 above.

Coda

103. I very much regret that it has been necessary for me to be as critical of another judge as I have been of Judge A.

104. However, the learned judge appears not to have taken to heart the guidance given by Upper Tribunal Judge Jacobs in *VS v Secretary of State for Work and Pensions* [2017] UKUT 274 (AAC) in which the First-tier Tribunal had taken the view that a claimant had attempted to conceal medical evidence that did not support her case. As I understand matters, the tribunal in that case was also one over which Judge A had presided. But even if I am mistaken about that, the guidance is in any event of general application.

105. Among other things, Judge Jacobs said:

> "10. Strike out aside, the tribunal can only take account of concealment in its assessment of the evidence. The purpose of that assessment is to identify the nature and extent to which the claimant's disablement restricts her functions in performing the descriptors in the relevant legislation. Usually tribunals can make best use of the limited time

> available for a hearing, or a consideration on the papers, by concentrating on assessing the evidence by reference to the statutory provisions. The claimant's honesty and integrity is, of course, part of that assessment, but there is a limit to which it is possible to carry out the necessary enquiry. This case is a good example. The tribunal's questions to the claimant and its reasons show that it investigated or took account of: (i) the dates when the psychological and Mr Siddique's reports were written; (ii) whether the former was referring to the latter or to some other report; (iii) the standard practice followed by solicitors handling personal injury litigation; (iv) the claimant's account of how her claim was handled; (v) the history and timing of the claimant's criticisms of the report; and (vi) even what the claimant meant by 'double-checking'. The scope for satellite issues to arise and require investigation increases the further a tribunal ventures from the ultimate purpose of the enquiry. All of that takes up time. *More importantly, it creates perceptions. It can create the impression that the tribunal is more concerned with the claimant's behaviour than with her capability for work. It can create the impression that the claimant has not received a fair hearing on that issue.* As Lord Hewart CJ famously said in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'
>
> 11. That is what has happened here. *By the number, strength and tone of the tribunal's criticisms of the claimant's evidence and her behaviour, the tribunal has provided a set of reasons that lack balance in the assessment of the evidence and has created an impression that its judgment of the claimant's behaviour has been a, or possibly even the, primary factor in deciding the case against her*. …" (my italics).

106. The passages I have italicised in that quotation apply equally in this appeal. But the impression created in this case is worse that the impression created in *VS*.

107. The Tribunal was entitled, and bound, to take proportionate steps to test the claimant's case. For example, I have not criticised Tribunal 2 for having contacted one of the claimant's doctors—even though in some circumstances that might have been descending too far into the arena—because there were genuine reasons for suspicion about the provenance of some of the documents said by the claimant to have emanated from him.

108. Taken together, however, the matters I have criticised go far beyond the proportionate, or even robust, questioning of the claimant's evidence and create the perception that Tribunal was being proactively hostile to the claimant's appeal.

109. The judicial oath binds those who take it to conduct themselves without (among other things) “ill-will”. Creating a perception that a tribunal is hostile towards one of the parties before it is therefore to be strenuously avoided, even if that perception is in fact groundless. It must not be permitted to happen again.

Authorised for issue
on 8 July 2021

Richard Poynter
Judge of the Upper Tribunal