DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Bradford East First-tier Tribunal dated June 1, 2016 under file reference SC240/15/01018 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated April 1, 2015 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge or members who were previously involved in considering this appeal on January 14, 2016 or June 1, 2016.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely April 1, 2015).

(4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Leeds within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This case is a good example of the principle that while tribunals are entitled to take a robust approach to the non-appearance of a party and to proceed to hear an appeal in that person's absence, a necessary concomitant of such a robust approach is a greater preparedness to set aside decisions where appropriate (see e.g. *Cooke v Glenrose Fish Co.* [2004] ICR 1188).

2. The Appellant's appeal to the Upper Tribunal in this case is allowed. The decision of the First-tier Tribunal involves an error on a point of law and is set aside. The Secretary of State's representative is in agreement on that course of action, but I give brief reasons for the benefit of all concerned, not least the First-tier Tribunal itself.

The background to this appeal to the Upper Tribunal

3. The Appellant is a lady aged 34. She has a diagnosis of hereditary spastic paraparesis, causing weakness in her legs and her legs to give way. Her claim for personal independence payment (PIP) was turned down on the basis that she scored only 6 points for daily living and 4 point for mobility. She appealed to the First-tier Tribunal and asked for an oral hearing of her appeal.

4. On January 14, 2016, the First-tier Tribunal (from now on FTT1) heard the Appellant's appeal in her absence. FTT1 scored the Appellant at 6 points for daily living and 8 points for mobility, so made an award of the standard rate of the mobility component of PIP.

5. The Appellant applied for that decision to be set aside, saying that she had not attended as she had not received notification of the hearing. A District Tribunal Judge set aside FTT1's decision and directed a rehearing, noting that "without binding the next Tribunal, the hearing on the next occasion is to go ahead whether or not the Appellant, or anyone on her behalf, attends".

6. On June 1, 2016 a new First-tier Tribunal (FTT2) heard the appeal just after 3 p.m. The Appellant did not attend but her sister did. FTT2 noted there was a postponement request as the Appellant's son was ill and there was no-one else to look after him. The application was refused "given the history in this case". The exchange between the tribunal and the Appellant's sister at the start of the hearing is recorded as follows:

> 'She rang up to say child [ill].
> I have not brought any evidence of child being ill.
> I spoke to sister at 12:30 today on the phone and she had had a fall when on the phone.
> …
> Why could she not come? In pain.'

For reasons that will become apparent I regard the sister's reference to a phone call at 12:30 as an approximate timing.

7. FTT2 proceeded to hear the appeal. FTT2 refused to allow the sister to see the case papers as they did not have written authorisation from the Appellant to do so. Nonetheless, FTT2 allowed the appeal and awarded the Appellant 6 points for daily living and 10 points for mobility, but with the same practical outcome as FTT1.

8. The Appellant again applied for a set aside. She explained in her letter:

> 'I had called the tribunal service in the morning on the day of the hearing requesting for a postponement as my younger child was ill. I received a message from the tribunal service stating the hearing could not be postponed and was to take place. I arranged childcare and [was] on the phone to the tribunal service to enquire what time the hearing was when my leg gave way and I fell down the step.'

9. A District Tribunal Judge refused the second set aside application, stating it was unclear why the Appellant had not given her sister her appeal papers and why the sister could not have looked after the son. I simply note that it has subsequently transpired that, at the Appellant's request, her sister had come to the hearing direct from work.

10. FTT2 later produced a statement of reasons. In explaining why it had decided to proceed, it repeated the queries raised by the District Tribunal Judge who had refused the second set aside application. FTT2 also referred to the alleged fall, stating "we doubt that this is genuine given the chronology and the lack of medical evidence to corroborate."

11. The Appellant then appealed to the Upper Tribunal. The District Tribunal Judge refused permission to appeal.

The proceedings before the Upper Tribunal

12. I gave the Appellant permission to appeal. In doing so I remarked as follows:

> '5. The FTT gave two reasons for not accepting the account of a fall. The first was the chronology and the second was the lack of medical evidence to corroborate the fall. As the fall had happened on the day of the hearing, and the Appellant's sister had apparently attended direct from work, I am struggling to see whether it was realistic or reasonable to expect medical evidence to have been produced that very same day.
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> 6. But there is a more significant issue here as regards the chronology. The FTT's GAPS2 computer records system, which documents clerical actions on an appeal, clearly records that the Appellant telephoned the tribunal office on the day of the hearing at 12:38. The relevant entry reads:
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> > **"TC [telephone call] from app. Rang to know what time the hearing was but then she ended up falling down and the phone cut off."**
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> 7. I recognise the record of that call may not have been readily available to the FTT sitting in Bradford on the day of the hearing (when the call was made to the regional tribunal office in Leeds). However, it would surely have been available when the set aside application was considered at a later date, but appears not to have been consulted.
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> 8. There is, therefore, clear corroborating evidence of a fall as the Appellant has described on the day of the hearing. On that basis it seems plain that the 1 June 2016 FTT erred in law in proceeding under rule 31 to hear the case. The FTT had the benefit of the sister's evidence but not first-hand evidence from the Appellant.'

13. Ms G Lancaster for the Secretary of State is content that the appeal is allowed and the matter is remitted (or sent back) for re-hearing to a new tribunal. The Appellant unsurprisingly takes the same view.

14. It is important that each application (e.g. for a set aside) is dealt with on its own merits. A previous history might suggest that a further application may have little merit. However, I am satisfied in this case there was in effect a breach of natural justice for FTT2 to proceed with the hearing in these circumstances. It is unfortunate the GAPS2 record was apparently not checked on the second set aside application, as that would have provided clear corroboration for the Appellant's account. I accordingly find that the Tribunal's decision involves an error of law and so should be set aside.

What happens next: the new First-tier Tribunal

15. The case now needs to be reheard by a new First-tier Tribunal. This should not include any of the members of FTT1 or FTT2. I cannot predict what will be the outcome of the re-hearing. I must make it clear that the fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new Tribunal will succeed *on the facts*.

16. So the new Tribunal may reach the same, or a different, decision to that of the previous tribunal. I have no view as to the likely outcome. It all depends on the findings of fact that the new Tribunal makes.

17. Regrettably the new Tribunal will have to focus on the Appellant's circumstances as they were as long ago as April 2015, and not the position as at the date of the new hearing, which will obviously be more than two years later. This is because the new Tribunal must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998).

Conclusion

18. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 23 May 2017

Nicholas Wikeley
Judge of the Upper Tribunal