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 Colchester First-tier Tribunal dated 10 April 2017 under file reference SC304/17/00155 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 15 September 2016 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, medical member or disability member who previously considered this appeal on 10 April 2017.

(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 15 September 2016).

(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 Birmingham within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> 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

The lesson for First-tier Tribunals from this appeal

1. The elementary lesson from this appeal is that before proceeding with a hearing in absence, on the basis that an appellant does not wish to attend a hearing, tribunals should check the claimant's address and read her correspondence.

The Upper Tribunal's decision in summary in this case

2. I allow the Appellant's appeal to the Upper Tribunal. The First-tier Tribunal's decision involves an error on a point of law. I therefore set aside the tribunal's decision.

3. The case now needs to be reheard by a new First-tier Tribunal (or "FTT"). I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* (and in relation to a procedural matter) is no guarantee that the re-hearing of the appeal before the new FTT will succeed *on the facts*.

4. So the new tribunal may reach the same, or a different, decision to that of the previous tribunal. It all depends on the findings of fact that the new tribunal makes. So it is important that the Appellant attends the FTT re-hearing to explain how her health conditions affect her in her day-to-day life. She can, of course, bring a family member and/or friend for support.

The background to this appeal to the Upper Tribunal

5. The Appellant made a fresh claim for Personal Independence Payment (PIP). The decision-maker scored her at 6 daily living points and 4 mobility points, and so refused to make an award of PIP. Following a mandatory reconsideration request, that refusal was confirmed. The FTT, following a hearing on 10 April 2017 which the Appellant did not attend, dismissed the Appellant's appeal.

The procedural issue: Cambridge, Colchester and all points east

6. The Appellant lives in Northolt in Middlesex. She has had the misfortune to be involved in an accident when travelling on a bus, which has left her very nervous about travelling on public transport. She had attended a medical assessment in Harrow, which is only 3 or 4 miles from Northolt. However, she also stated in her notice of appeal and on her hearing enquiry form that she was not able to attend a tribunal hearing (p.1A).

7. Such cases, where a claimant has asked for the appeal to be considered without attending a hearing, are typically allocated to any tribunal sitting in the relevant HMCTS region, depending on listing availability. They are not listed at the venue that is geographically closest to the claimant's home, precisely because the claimant has said they are not attending the hearing. Appellants cannot be expected to realise that is how HMCTS organises the FTT's business.

8. In this case the papers were sent to a tribunal sitting in Cambridge (p.84). The Cambridge tribunal, sitting on 27 February 2017, adjourned the hearing to give the Appellant the chance to attend a hearing. The tribunal very reasonably stated it would be helpful to hear direct from the claimant. But for reasons that are entirely unclear, the Cambridge tribunal also reserved the case to the same venue. Unsurprisingly, the Appellant wrote to the FTT office (p.85), saying that as she lived in Northolt she would not be able to attend a hearing in Cambridge (which is about 60 miles away).

9. In response HMCTS listed the appeal for a hearing in absence again, but this time in Colchester (over 90 miles away) on 10 April 2017 (p.91). The FTT decided it was fair and just to proceed in her absence as the Appellant had indicated she would be unable to attend the hearing.

The proceedings before the Upper Tribunal

10. The Appellant appealed to the Upper Tribunal. Her grounds of appeal were really an attempt to re-argue the case on its facts. However, I gave the Appellant permission to appeal as follows:

> "5. It is by no means clear to me that the FTT really paid any attention to the Appellant's quite reasonable point about where she lived. The SEC website explains that there are a number of venues closer to where she lives (e.g. Hatton Cross (Feltham) and Watford). See for example https://courttribunalfinder.service.gov.uk/search/postcode?aol=Social%20security. However, the Appellant perhaps not unreasonably assumed it had to be heard in Cambridge, especially given the directions on p.84. It may be that the Appellant's other reasons for not wishing to attend may still have applied, but attending a hearing in Feltham is a very different prospect to a trek to Cambridge. This case may have some similarities to the case of *EN v Slough Borough Council (HB)* [2016] UKUT 343 (AAC). The process adopted may therefore have been procedurally unfair, which might amount to an error of law."

11. Ms Stacey Kiley, who now acts for the Secretary of State, very fairly supports the appeal to the Upper Tribunal on that basis. She also helpfully refers to the ruling in CPIP/1722/2016, where Judge Eleanor Grey GC held as follows:

> "However, it is plain from *DG v Secretary of State for Work and Pensions (ESA)* [2010] UKUT 409 (AAC) that, for an effective waiver of the right to an oral hearing to take place, an appellant must not be given misinformation (even by a third party unconnected with the Tribunal), or deprived of all the material facts or information as to the consequences of the choice open to him or her. In this case, the appellant did not receive accurate information about a point of some practical importance (venue) before deciding finally not to attend her appeal. I am satisfied that, as a result, she was deprived of the right to a fair hearing. The appeal must be allowed on this basis."

12. In CPIP/1722/2016 also the claimant had originally opted for a hearing 'on the papers'. The FTT office wrote to her offering a hearing in Wakefield, being "the nearest hearing venue to you" (17 miles from her home). The claimant did not respond – but the appeal was then dismissed at a hearing in absence at Huddersfield (7 miles from her home). On the particular facts of that case, Judge Grey QC had some reservations as to whether the tribunal panel should have spotted the error that had occurred before deciding to proceed.

13. This case, it seems to me, is very much stronger. The appellant had the right to attend an oral hearing (see rules 27(1) and 28 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685)), and, having initially stated that she did not want one, she was still entitled to change her mind. Given the history of the adjournment by the Cambridge tribunal and the Appellant's correspondence, the FTT should have taken such matters into account before satisfying itself both that the Appellant had not objected to the matter being decided without a hearing and that it was able to decide the matter without a hearing (see rule 27(1)(a) and (b)).

14. I am satisfied that the FTT erred in law for the reason set out above. I therefore allow the appeal, set aside the FTT's decision and remit (or send back) the original appeal for re-hearing before a new tribunal. I formally find that the FTT's decision involves an error of law on the grounds as outlined above.

What happens next: the new First-tier Tribunal

15. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is all a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact accordingly.

16. In doing so, however, unfortunately the new FTT will have to focus on the Appellant's circumstances as they were as long ago as September 2016, and not the position as at the date of the new FTT hearing, which will obviously be about 18 months later. This is because the new FTT 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). The decision by the Secretary of State which was appealed against to the FTT was taken on 15 September 2016. It may be, of course, that there has been little change in the Appellant's condition since then.

Conclusion

17. I therefore 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 22 January 2018

Nicholas Wikeley
Judge of the Upper Tribunal