IN THE UPPER TRIBUNAL **Case No.** CPIP/1261/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The claimant appeared in person.

The Secretary of State was represented by Ms Julia Smyth of counsel, instructed by the Government Legal Department.

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 3 January 2017 is set aside and the case is remitted to the First-tier Tribunal so that the decision may be re-made by a differently-constituted panel.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 3 January 2017, whereby it dismissed her appeal against a decision of the Secretary of State dated 19 May 2016 to the effect that her award of the lowest rate of the care component and the higher rate of the mobility component of disability living allowance would terminate on 21 June 2016 and she would be entitled to the standard rate of both the daily living and care components of personal independence payment from 22 June 2016 until 24 April 2022.

Background

2. Part 4 of the Welfare Reform Act 2012 introduces personal independence payment as a social security benefit to replace disability living allowance. Sections 78 and 79 provide for two components of personal independence payment, the daily living component and the mobility component, entitlement to which depends on the extent to which the claimant's ability to carry out "daily living activities" or "mobility activities" is limited and each of which may be paid at a "standard" rate or an "enhanced" rate. Regulations 3 to 7 of, and Schedule 1 to, the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) provide a scheme for the assessment of a claimant's ability to carry out such activities. In summary, there are ten daily living activities and two mobility activities, in respect of each of which there are various descriptors which, if satisfied, lead to an award of a prescribed number of points (regulation 3 and Schedule 1). Whether a claimant can carry out an activity is assessed on the basis that he or she is wearing or using an aid or appliance that he or she would normally wear or use or could reasonably be expected to wear or use (regulation 4(2)) and a claimant is to be assessed as satisfying a descriptor only if he or she can do so safely, to an acceptable standard, repeatedly and within a reasonable time period (regulation 4(2A)). Regard is generally had only to descriptors satisfied for more than 50% of the days of the "required period" and only the highest scoring descriptor for each activity counts, but provision is also made for cases where two or more descriptors are satisfied for periods which, between them, amount to over 50% of the relevant days (regulation 7). The points awarded in respect of the highest-scoring descriptor of each of the

daily living activities are then added together. If 8 to 11 points are awarded, the claimant is entitled to the standard rate of the daily living component and, if 12 or more points are awarded, the claimant is entitled to the enhanced rate of that component (regulation 5). Points awarded in respect of the mobility activities are added together in the same way so as to give entitlement to the standard or enhanced rates of the mobility component (regulation 6).

3. When I first considered the claimant's application for permission to appeal, I commented that her application had not focused on the criteria for entitlement to personal independence payment but suggested that that was not surprising because it seemed to me that they had not been fully explained to her. That raises an issue that goes much wider than the present appeal and upon which I shall make some observations below. However, I will first explain why I now allow the claimant's appeal even though initially I expressed some doubts about its prospects of success.

The claimant's case

4. The claimant suffered a serious back injury in 2010 and she has suffered a considerable amount of pain since then, despite surgery and powerful painkillers. Another consequence of the injury is that she also suffers from incontinence. She was awarded the lowest rate of the care component and higher rate of the mobility component of disability living allowance but in early 2016 she was invited to claim personal independence payment as part of the general migration of claims from disability living allowance to personal independence payment. On that claim, the Secretary of State decided that the claimant scored 8 points in respect of the daily living component (descriptors 1(b), 4(b), 5(b) and 6(b)) and 10 points in respect of the mobility component (descriptor 2(d)), so that she was entitled to the standard rate of both components, and that decision was maintained on mandatory reconsideration. When the claimant appealed, the Secretary of State conceded in his response that the claimant should have scored three points under daily living descriptor 4(e), rather than two under descriptor 4(b), thus bringing the total in respect of the daily living component to 9, but that would not have affected the outcome because the claimant needed to score 12 points to be entitled to the enhanced rate of a component and so he did not revise his decision.

5. The First-tier Tribunal seems to have overlooked that concession because it did not allude to it and, although it decided that the claimant scored 9 points in respect of the daily living activities, it did so by awarding a point under descriptor 3(b) as well as those originally awarded by the Secretary of State. On the other hand, that error is not in itself material because a score of 10 points would still not have been enough for entitlement to the enhanced rate of the daily living component. Similarly, while the First-tier Tribunal's reasoning in respect of some of the other daily living activities might not be thought to be adequate if read in isolation, it does not give rise to a material error of law in the absence of any evidence or suggestion before me that the claimant might have satisfied a higher-scoring descriptor than that found to be satisfied.

6. I turn then to the mobility component which, understandably, is of greater concern to the claimant because her failure to qualify for the enhanced rate of the

mobility component of personal independence payment, having previously been entitled to the higher rate of the mobility component of disability living allowance, led to the loss of her "blue badge" and exemption from vehicle excise duty and so, I think, to the loss of the use of the car that she used to drive herself and in which friends had also driven her about. Mobility activity 1 does not appear to have been a live issue, because the claimant did not have a relevant mental or sensory disability and so she was able to plan a journey and, to the extent that she was physically able to undertake a journey, did not need prompting or accompanying to do so. It was her physical limitation that was important, as was acknowledged by both the Secretary of State and the First-tier Tribunal in finding that mobility descriptor 2(d) was satisfied. The descriptors are in the following terms –

Activity	*Descriptors*	*Points*
2. Moving around.	a. Can stand and then move more than 200 metres, either aided or unaided.	0
	b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided	4
	c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
	d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.	10
	e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
	f. Cannot, either aided or unaided, – (i) stand; or (ii) move more than 1 metre.	12

7. The First-tier Tribunal's consideration of mobility activity 2 in its statement of reasons was brief. It said –

> "17. In considering her ability to move around the health care professional took the view that she could stand and move using an aid or appliance more than 20 metres but no more than 50 metres and had awarded 10 points under descriptor 2d. That appeared at page 98 and again at page 115. In her evidence the appellant said she could walk 100 metres but would then have to stop because of pain. The Tribunal preferred the evidence of the health care professional in that mobilising clearly caused the appellant considerable pain and that she would be able to move more than 20 metres but no more than 50 metres using an aid before limited by pain and in order to achieve that repeatedly and reliably. Therefore 10 points would be awarded under Descriptor 2d."

The health care professional had said –

> "She reports a problem with this task due to pain and weakness. This is consistent with her condition history. She stated today that she can walk 20-30 metres before

> she needs to stop due to pain. MSO findings show reduced power in both lower limbs and informal observations show she walked at a slow pace and with a limp and appeared in pain when walking. She is on high pain relief. Therefore she can move more than 2[0] metres but no more than 50 metres, aided, repeatedly and reliably in a timely manner."

8. Unusually, the First-tier Tribunal's preference for the health care professional's evidence rather than the claimant's appears in this case to have been to the claimant's advantage and to have been based on the health care professional having taken into account whether the claimant could carry out the activity "repeatedly and reliably in a timely manner", presumably with regulation 4(2A) in mind. However, it seems to me that that rather points up the fact that the First-tier Tribunal does not appear to have probed the claimant's oral evidence with regulation 4(2A) in mind and this is important because neither the health care professional nor the First-tier Tribunal has really explained why mobility descriptor 2(e) did not apply if regard was had to regulation 4(2A). If descriptor 2(e) applied – or if descriptor 2(f) did, but that seems not to have been a live issue in this case – the claimant would have scored 12 points and been entitled to the enhanced rate of the mobility component.

9. Regulation 4(2A) and (4) provides –

> **"**(2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—
>
> (a) safely;
> (b) to an acceptable standard;
> (c) repeatedly; and
> (d) within a reasonable time period.**]**
>
> …
>
> (4) In this regulation—
>
> (a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
> (b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and
> (c) "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity."

10. It is an inevitable consequence of the structure of the scheme that the reasons for choosing a particular descriptor as the highest point-scoring descriptor that is satisfied for the relevant activity must necessarily include reasons for not finding that a higher-scoring descriptor is satisfied in respect of the same activity, although there need not be an explicit reference to a descriptor where the evidence shows that it clearly could not have been in issue. Thus, an adequate explanation for finding descriptor 2(d) to be satisfied must necessarily include an explanation for finding that descriptors 2(e) and 2(f) are not satisfied, although in this case it was probably not necessary to address descriptor 2(f) expressly.

11. Regulation 4(2A) is likely to have an important role whenever mobility activity 2 is in issue. The assessment of disablement often depends substantially on the

history taken from a claimant and asking about what he or she does in the course of normal day-to-day life but, while it may sometimes reasonably be presumed that a person does only what can be done safely, to an acceptable standard, repeatedly and within a reasonable time period, that is not always so. In particular, where it is acknowledged that a person has substantial difficulties in moving around, such that at least one point-scoring descriptor under mobility activity 2 is satisfied, reliance on any such a presumption and not asking specific questions with a view to checking whether regulation 4(2A) is satisfied is unlikely to be appropriate. In her letter of appeal to the First-tier Tribunal and several times since then, the claimant has made the point that her son, who used to provide a degree of care for her and run errands, had moved out of her home. (This seems to have been before the health care professional's examination.) One possible implication of her written evidence is that she may since then, out of necessity, have been pushing herself to, or beyond, the limits of what it is reasonable to expect from her. Regulation 4(2A) has the effect that any ability to move around unsafely or only to a standard that is not acceptable or only on isolated occasions or only too slowly is to be disregarded. The terms "safely", "repeatedly" and "reasonable time period" are all defined in regulation 4(4). The phrase "an acceptable standard" is not defined but presumably requires consideration of the manner in which movement can be made and the amount of pain or discomfort that is suffered when moving. Safety may not be an issue in the present case but, even if the claimant could push herself to walk 100 metres at the material time without stopping and even if it were considered that that implied an ability to move 20 metres repeatedly, it would not necessarily imply an ability to do so to an acceptable standard or within a reasonable time period.

12. The claimant appeared to be in considerable discomfort at the hearing before me. Ms Smyth told me that she had spoken to the claimant before the hearing and, in consequence, that the Secretary of State was minded to look at her case again, in particular because there was some evidence of the claimant's condition having deteriorated over the last year and a half. However, she initially resisted the appeal on behalf of the Secretary of State on the ground that the First-tier Tribunal had not made a material error of law.

13. This was understandable because it is not obvious from the statement of reasons that the First-tier Tribunal did err in law. However, when I drew the claimant's attention to the First-tier Tribunal having stated that she had said that she could walk 100 metres, she told me that she had not said that and that the First-tier Tribunal had not asked her many questions. It is plain from the record of proceedings that she had been asked questions about her ability to walk and that the reference to 100 metres came from what she had said about going to a pharmacy that was near her home. When this was pointed out to her, she remembered that being discussed and told me that she had great difficulty getting to the pharmacy due to the pain she suffered when walking and that she stopped on the way. She said that there was a salt bin about 30 to 40 metres from her house and she "would dump myself on the salt bin and wait for the spasms to pass" so that it took her nearly ten minutes to get to the pharmacy and back. Having heard the claimant answer the questions that I had put to her, Ms Smyth indicated that the Secretary of State would not object to the appeal being allowed on the ground that

the First-tier Tribunal had not adequately exercised its investigatory or inquisitorial role in the light of regulation 4(2A).

14. I consider that concession to be well made. The First-tier Tribunal's statement of reasons shows that it clearly had regulation 4(2A) in mind but I have been persuaded that it has not shown that it adequately considered it in relation to mobility descriptor 2(e) and that its questioning of the claimant may not have been sufficiently detailed for it to make the findings of fact necessary to enable it to give adequate reasons. The record of proceedings does not purport to be a verbatim account of her evidence to the First-tier Tribunal – and anyway I find it difficult to read some of the handwritten words – and so I am not sure exactly what was said to the First-tier Tribunal, but there does seem to be a reference in the claimant's evidence to stopping on the way to the pharmacy. In these circumstances, I am not satisfied that the record of proceedings adequately explains the First-tier Tribunal's implicit conclusion that descriptor 2(e) was not satisfied so as to make up for the lack of explicit reasoning in the statement of reasons. Moreover, the claimant has persuaded me that she had an arguable case on the facts so that the lack of explicit reasoning was a material error of law.

15. I therefore allow the claimant's appeal. I remit the case, rather than hearing further evidence and attempting to decide it myself, because the medical expertise of the First-tier Tribunal might be of assistance. However, if the Secretary of State were to decide that the claimant should be awarded the enhanced rate of the mobility component of personal independence payment, as well as the standard rate of the care component, not only from now but also from 22 June 2016, he would be able to revise his original decision so that a further hearing before the First-tier Tribunal would be unnecessary.

The broader issue

16. Before hearing argument on the more general point that I had raised when I first considered the case, I told the parties that I would allow the claimant's appeal and I gave her an opportunity to leave if she did not wish to sit through, and contribute to, argument that would not affect the outcome of her appeal. She took her chance and went, merely making the pertinent observation that, when questions are asked of claimants, they need to be in simple terms (or, perhaps, more specific) because she had found some of the questions she had to answer difficult to understand. For instance, as had been illustrated earlier in the hearing, she said that she had not realised that when she was asked how far she could walk she also had to say how often she stopped.

17. As I have mentioned, the issue that concerned me when I first saw this case was the limited extent to which the Secretary of State had explained in his response to the claimant's appeal to the First-tier Tribunal the legal basis for his decision and the framework within which the appeal had to be determined which, I suggested, might have contributed to the lack of focus in the claimant's grounds of appeal to the Upper Tribunal. The practice in personal independence allowance cases seems to be different from that in cases concerning employment and support allowance, which is another benefit where entitlement may depend on the number of points scored in

respect of descriptors related to various activities. Responses to appeals in employment and support allowance cases usually include a document setting out all the descriptors and the points that may be scored under them, with the result that an appellant has the opportunity to argue his or her case by reference to the descriptors, whereas my experience is that only in a minority of responses in personal independence payment cases, of which this was not one, are there set out all of the descriptors and the points that may be scored under them.

18. It is necessary when considering a claimant's appeal to focus on descriptors that the Secretary of State did not accept were satisfied but which might add to the claimant's score. An unrepresented claimant is unlikely to be able to do so unless either the Secretary of State or the tribunal itself enables the claimant to identify the relevant descriptors and to understand why the question whether he or she satisfies them is important. This is more of an issue in relation to some activities than others. Thus, as regards mobility activity 2, where the descriptors are mutually exclusive, a claimant's acceptance that, say, descriptor 2(d) is satisfied excludes the possibility of descriptors 2(e) or 2(f) being satisfied, although a claimant will not be aware of that unless aware of all the descriptors. On the other hand, daily living activity 1 is in the following terms –

Activity	*Descriptors*	*Points*
1. Preparing food.	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8

A claimant's acceptance that descriptor 1(b) applies excludes the possibility of descriptor 1(f) being satisfied and makes it unnecessary to consider descriptors 1(c) and 1(d), because they give rise to the same number of points, but the possibility that descriptor 1(e) might be satisfied still has to be considered. Unless a claimant is aware of the full list, including the number of points that can be scored in respect of each descriptor, how can he or she know which of his or her needs might make a difference to the score in respect of that activity and which cannot?

19. It is true that the descriptors can in fact be seen in the health care professional's report that will almost always accompany a response and that the Secretary of State's original decision and his decision on "mandatory reconsideration" usually indicate the number of points scored in respect of the highest scoring descriptor for each activity that the Secretary of State has found

satisfied and also explain that at least 8 points are needed for entitlement to the standard rate, and at least 12 points are required for the enhanced rate, of each component. However, it may not be obvious to all claimants that health care professionals' reports do set out all the descriptors and nowhere in the documents provided to the claimant in this case was there any indication of the number of points that might have been scored in respect of descriptors other than those found satisfied by the Secretary of State.

20. Accordingly, I suggested that the claimant had not been made aware of the real issues in her case so as to be able to focus her arguments to the First-tier Tribunal or the Upper Tribunal by reference to the descriptors that she might have claimed, although I was not at that time persuaded that any unfairness resulting from a lack of explanation to the claimant of the scoring system had affected the outcome of her appeal to the First-tier Tribunal. I therefore directed the Secretary of State to make a submission that included the full text of regulation 4(2A) of, and Parts 2 and 3 of Schedule 1 to, the 2013 Regulations and also addressed the question whether the state of affairs that had existed before the First-tier Tribunal was either fair or desirable. I said that, once the Secretary of State had complied with that direction, the claimant would be able to indicate whether there were any other descriptors that she would have argued she satisfied had there been a fuller response to her appeal to the First-tier Tribunal.

21. In his submission, drafted by Ms Smyth, the Secretary of State described the statutory scheme and also pointed out that the claimant would have had, when filling in her claim form, a copy of a PIP2 Information Booklet, which, although it does not include a list of all the descriptors, does explain that only one descriptor is selected for each activity and also effectively summarises regulation 4(2A) (but not regulation 4(4)). Moreover, although there was no summary of the law in the response to the appeal to the First-tier Tribunal itself, there was a reference to two website addresses where the main 2013 Regulations could be found (and there was in fact also a single specific statutory reference – to regulation 17(1)(b) of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387)). Further, the Secretary of State's decisions had also referred the claimant to sources of advice, including a reference to *www.gov.uk/pip* where information about personal independence payment can be obtained, although that does not appear to lead to a list of all the descriptors and the points scored. It was argued that, in all the circumstances, there was no unfairness and that the question as to what information it was merely *desirable* for claimants to receive did not fall for determination.

22. When the claimant replied to the Secretary of State's submission, by which time I had already given permission to appeal and directed that the hearing should be the hearing of the appeal rather than just of the application for permission, she referred to a number of the daily living activities and both mobility activities but did not expressly claim to satisfy mobility descriptor 2(e) and did not expressly refer to regulation 4(2A), although she did refer to the pain she suffered when walking, to having to keep stopping and to the slowness of her walking. In the event, it is the claimant's oral evidence about those difficulties that has led to me concluding that the First-tier Tribunal's reasoning was not adequate and that the claimant's appeal should be allowed.

23. In these circumstances, Ms Smyth submitted that this was not an appropriate case in which the Upper Tribunal should issue general guidance as to the extent of the Secretary of State's duty to include information for those appealing against decisions in respect of personal independence payment in his responses to their appeals. It was, she submitted, dangerous to make rulings of law in cases in which the issues did not really arise and it would be difficult for the Secretary of State to appeal if he considered a ruling to be wrong. Moreover, she submitted that the issues raised were both of legal importance and of practical importance. In relation to their legal importance, she submitted that it would be desirable for them to be determined in a case where there was legal representation on both sides so that there was an exchange of skeleton arguments and, in relation to their practical importance, she said that the Secretary of State would wish to file evidence because over 70,000 appeals a year would be affected and any ruling might have serious implications for the Department's technical systems, its staffing, its budgeting, its guidance to staff and staff training. (I was told that that 70,000 was the number of appeals of a type that might have been affected from April 2016 to March 2017 but I do not know how the figure was computed and I think that the total number of personal independence payment appeals being received annually by the First-tier Tribunal is currently higher. What is beyond dispute is that the relevant number is large.)

24. I was not impressed by the suggestion that the Secretary of State should be afforded a further opportunity to submit evidence in this case, given that he had had two extensions of time before his written submission was provided and he had also had ample additional time to prepare for the hearing. I also do not accept that the mere fact that the point is academic means that the Upper Tribunal should not rule on it, given that it is of fundamental importance to the operation of tribunals and, for reasons that will appear below, it is difficult to see how it could arise as the determinative issue on an appeal to the Upper Tribunal. However, although claimants seldom have legal representation before the Upper Tribunal in social security cases, I accept that the Secretary of State may, like a litigant in person, be handicapped in preparing his arguments and defending his position if he does not have the sort of clear idea of the case against him that would be provided by a skeleton argument from a legal representative of a claimant (although it seems somewhat ironic that the Secretary of State has raised the argument in this particular case).

25. There is another factor that militates against my giving a ruling in this case on the issue of the adequacy of the Secretary of State's responses to personal independence payment appeals, which is my doubt about the appropriateness of the Upper Tribunal giving binding guidance in any great detail. While the Upper Tribunal can properly state in general terms what would constitute an adequate response to an appeal and can decide that particular responses were inadequate in particular cases, it is not in my view appropriate for a single judge of the Upper Tribunal to prescribe the contents of a response.

26. On the other hand, Ms Smyth said in her written submission that, although the Secretary of State took the view that there was no unfairness in this case and that

the issue of what was desirable was not a matter for determination in this appeal, the comments I had made "are presently the subject of careful consideration within the Department". I will therefore expand those comments in the light of her submissions, so that my concerns are in the public domain. (I have made similar comments in respect of responses made by the Secretary of State for Defence to appeals to the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal (see *Secretary of State for Defence v CM (WP)* [2017] UKUT 8 (AAC); [2017] AACR 27 at [80] to [89].) My comments will also mean that the Secretary of State will be aware of at least some aspects of the case he has to meet in the event of this issue being raised again in the Upper Tribunal, as I am sure it will be. However, I emphasise that they are mere *obiter dicta*.

Observations

27. The broad legal framework is, I think, relatively uncontroversial. Ms Smyth submitted that, in this area, there are no material differences between the effect of the common law rules of natural justice and the effect of Article 6 of the European Convention on Human Rights and that the question whether there has been a breach of either in any particular case depends very much of the facts and context of that case. She referred me to *R. (Gudanaviciene) v Director of Legal aid Casework* [2014] EWCA Civ 1622; [2015] 1 WLR 2247 at [46] where, in relation to Article 6, it was held that "equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent".

28. Ms Smyth also pointed out that, at [56] of *Gudanaviciene*, it was held that it was relevant that, even in the adversarial system of the courts in the United Kingdom, "judges can and do provide assistance to litigants in person". Such assistance, she submitted, is all the more likely in tribunal proceedings in social security cases, which are investigatory or inquisitorial rather than adversarial (see *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372 (also reported as R1/04(SF)) and where the First-tier Tribunal may actually be better able to investigate the facts than a decision maker (R(IB) 2/04 at [14]) and has "an appropriate balance of experience and expertise amongst its members" (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781 (also reported as R(DLA) 5/06) at [22]) to enable it to do so.

29. That being so, I accept that the focus of an appeal on a point of law to the Upper Tribunal will generally be on whether the claimant received, in whatever form and from whatever source, enough information to enable him or her to put his or her case to the First-tier Tribunal and whether the First-tier Tribunal, as Ms Smyth put it, asked the right questions and, in effect, remedied any defect in the Secretary of State's decision-making or in his response to the appeal. Moreover, any failure to remedy a defect is only material, and so an error of law, if it might have affected the outcome. Thus, in this case, where the claimant did not materially alter the way she advanced her arguments after she had been given the information that I directed the Secretary of State to provide, the failure to provide that information earlier arguably did not in fact give rise to unfairness. (On the other hand, of course, I am in a

position to make that particular judgement only because the information has now been provided in the Upper Tribunal proceedings.)

30. However, the Secretary of State's approach, with its reliance upon the investigatory or inquisitorial role of the First-tier Tribunal, has implications for a claimant's ability to prepare his or her case *before* a hearing and, in particular, to obtain or provide relevant evidence, unless the Secretary of State expects the First-tier Tribunal to enter into a dialogue with a claimant and provide further information before a hearing takes place. Moreover, a significant proportion of appeals are determined without a hearing at all and the Secretary of State's approach also has implications for a claimant's ability to make an informed choice as to whether to consent to his or her appeal being determined without a hearing and for the First-tier Tribunal's consideration of the question whether it is able fairly to decide the matter without a hearing (see rule 27(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) – hereinafter, the "2008 Rules"). If the First-tier Tribunal asks itself whether the claimant has had an adequate opportunity to present his or her case on paper, it might well say "no" in significantly more personal independence payment cases than it does in employment and support allowance cases if it considers claimants have not adequately been made aware of the real issues arising in their appeals.

31. Thus, the legal question in a case such as the present may not only be whether there has actually been unfairness but, additionally or alternatively, whether the response to the appeal to the First-tier Tribunal was sufficient for proper compliance with the requirement in rule 24(2)(e) of the 2008 Rules to set out his grounds for opposing the appeal (insofar as they are not included in another document, such as the mandatory reconsideration notice). This issue is unlikely to be determinative in any particular appeal, because, as I have said above, the appeal will turn on whether the overall procedure was unfair and not just whether the response was inadequate, but inadequacy of a response is capable of being a significant factor. Moreover, a response may have been inadequate if it had the potential for creating unfairness, even if it did not actually cause unfairness in the particular case in hand.

32. I accept Ms Smyth's submission that there is no general duty on the Secretary of State to provide a claimant with legal *advice* but, in my view, rule 24(2)(e) of the 2008 Rules does require him to provide a claimant with a certain amount of legal *information* (as, indeed, do other provisions such as regulation 28(1)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), which requires him to inform a claimant of any right of appeal against a decision he is making). This is for two reasons.

33. First, grounds for opposing an appeal must include not only an explanation for his findings of fact but also an explanation of the legal basis for his decision which, as I have already explained, requires in a personal independence payment case not only reasons for finding that selected descriptors are satisfied but also reasons for finding that no higher-scoring descriptors are satisfied which, it seems to me, makes it necessary to say what those descriptors are..

34. Secondly, rule 24(2)(e) must be read with rule 2, which provides –

> "**2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes—
> (a) …;
> (b) …;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) …; and
> (e) ….
> (3) ….
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) …."

It is obviously arguable that rules 2 and 24(2)(e), read together and with *Gudanaviciene*, require the Secretary of State to set out his grounds for opposing an appeal in a manner that has regard to his duty to enable the First-tier Tribunal to ensure, so far as is practicable, that the claimant is able to participate fully in the proceedings under conditions that do not place him or her at a substantial disadvantage vis-à-vis the Secretary of State. I have some difficulty in seeing how that can be achieved if the framework within the First-tier Tribunal must make its decision is partially hidden from the claimant because the claimant is not made aware of the descriptors potentially in issue.

35. In my judgment, it is the combination of the duty to give reasons for opposing the appeal and the duty to act fairly that require the Secretary of State to take a different approach in proceedings before the First-tier Tribunal from the approach he takes to his own decision-making. In making decisions himself, he may be entitled to investigate a claim by giving a claimant opportunities to provide information without fully explaining what information might be relevant, as seems to be the approach in personal independence payment cases. However, proceedings before the First-tier Tribunal are judicial and judicial standards of fairness apply.

36. Even if the response to the appeal to the First-tier Tribunal in the present case was not actually unfair or otherwise unlawful, it was potentially unhelpful to both the First-tier Tribunal and to the Upper Tribunal. A claimant cannot be expected to focus on the potentially relevant descriptors unless either the Secretary of State or the tribunal itself enables the claimant to identify them and to understand why the question whether he or she satisfies them is important, one aspect of which is simply that the point-scoring system is statutory and binds the First-tier Tribunal as much as it binds the Secretary of State's decision makers. Moreover, I would suggest that claimants who understand the scheme are not only likely to bring better focused appeals when they have a good case but also may be less likely to bring appeals at all when they do not have a good case. A bare reference to the website where the legislation can be found is unlikely to be sufficient by itself.

37. On the other hand, I recognise that presenting the Secretary of State's argument in too technical a manner, with copious extracts from legislation, may

overawe some claimants. There is a lot more to the legislation than Parts 2 and 3 of Schedule 1 to the 2013 Regulations and, in particular, regulation 4(2A) and some of the definitions in Part 1 of that Schedule and in regulations 2 and 4(4) may be crucial in some cases and other provisions may be crucial in others. It is not easy, and indeed not always possible, for the Secretary of State to anticipate which particular provisions of the legislation are going to be of central importance when the appeal is determined, particularly as the issues explicitly raised by the claimant may not necessarily be the issues that the First-tier Tribunal considers important. A balance may need to be struck between supplying too much information in a response and supplying too little. Information focused on the particular case in hand, which might include focused references to information obtainable elsewhere, is likely to be more useful than generic information, but providing it is obviously more time-consuming for submission-writers. Plainly, providing a list of all the descriptors in a standard format in all cases would make it less necessary for the Secretary of State expressly to address individual ones in a response in circumstances where it is not clear whether or not they might be in issue.

38. Ms Smyth very properly drew my attention to *IS v Craven District Council (HB)* [2013] UKUT 19 (AAC), where Upper Tribunal Judge Wright stated at [8(a)(iv)] that a respondent to an appeal to the First-tier Tribunal should "set out the relevant law (both statutory and caselaw)". In that respect, he was doing no more than describe in broad terms what might at the time have been regarded as conventional practice as to the contents of an adequate response. The Secretary of State's submission writers used always to write responses to appeals that set a case in its legal framework and generally made clear the legal reasons why a decision had been made and the Secretary of State's view of the options open to a tribunal in the context of the issues on the appeal. However, I would be inclined to accept that a more nuanced approach may be permissible, provided that the legal issues in a case are clear and the precise wording of key provisions is not glossed so as to give an inaccurate impression of their effect.

39. There are also different ways of providing information. Incorporating more information into decisions on mandatory reconsideration would enable less to be included in responses to appeals, as is explicitly recognized in rule 24(2)(e). Moreover, reproducing Parts 2 and 3 of Schedule 1 to the 2013 Regulations in a response might not be necessary if there were included in a health care professional's report, where it is shown which of the descriptors was selected by the health care professional in the claimant's case for each activity, the number of points that could be scored not only for the selected descriptors but also for each of the other descriptors. That information, taken with the information normally provided in the mandatory reconsideration notice as to the number of points required to qualify for each of the rates of the components and the information in the PIP2 Information Booklet, might be sufficient to explain the basic framework to claimants. Also, references to legislation may become more user-friendly if and when submissions are provided electronically so that such references could be in the form of hyperlinks to the relevant provisions. But then again, it has to be remembered that not all claimants have reliable access to the Internet.

40. As I have said, it would not be appropriate for the Upper Tribunal to be too prescriptive about any of this. However, if, as Ms Smyth submits, the question of the proper content of responses has significant implications for the Department in relation to thousands of cases, it also has significant implications for appellants and tribunals in those cases. It may therefore be expected that, in another case, the Upper Tribunal will consider it necessary to rule on the adequacy of the current style of responses and, in particular, the basic adequacy of responses in personal independence payment cases that do not inform appellants of the terms of descriptors that the Secretary of State has found not to be satisfied and the points that might be scored in respect of them.

Mark Rowland
15 February 2018