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 Plymouth First-tier Tribunal dated 1 April 2019 under file reference SC200/18/00845 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 original decision dated 9 July 2018 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 previously involved in considering this appeal on 1 April 2019.

(3) The Appellant's Appointee is reminded that the tribunal can only deal with the appeal, including the Appellant's health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 9 July 2018) – not as they are now.

(4) If the Appellant's Appointee has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the HMCTS regional tribunal office in Cardiff 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 Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Who this decision is about

1. This appeal is about Elliott, who is now aged 3½. He is technically the Appellant, but I refer to him as Elliott throughout this decision. Elliott's mother acts as his appointee for the purposes of his claim to disability living allowance (DLA).

What this appeal is about

2. The question at the heart of this appeal is whether Elliott is entitled to the highest rate of the DLA care component on the basis of his night-time care needs. I do not actually decide that fundamental question – my role is rather to determine whether the First-tier Tribunal ('the FTT') approached that question in the correct way as a matter of law. I should add that Elliott's entitlement to the middle rate DLA care component for day-time needs is not in dispute (as is his lack of entitlement to the mobility component, given his age at the time of the original decision).

This appeal to the Upper Tribunal: the result in a sentence

3. Elliott's appeal to the Upper Tribunal succeeds; but there will need to be a completely fresh hearing of the original DLA appeal before a new First-tier Tribunal and I cannot predict what the outcome of that re-heard appeal will be.

The Upper Tribunal's decision: the legal summary

4. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the Plymouth First-tier Tribunal dated 1 April 2019 under reference SC200/18/00845 involves a legal error. For that reason, I set aside the Tribunal's decision as of no effect and remit the appeal to a fresh Tribunal.

What happens next

5. The original appeal now needs to be reheard by a new First-tier Tribunal. The new Tribunal should hold an oral hearing in Plymouth. I cannot predict what will be the outcome of the re-hearing. 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 when applying the relevant law.

The background to this appeal to the Upper Tribunal

6. Elliott is a little boy now aged 3½ who has developmental delay and hypermobility. There is a suggestion in the papers that he may be investigated for autism, but there is, as yet at least, no such formal diagnosis on file. Elliott's mother, as noted already, is his appointee and on 17 May 2018 she made a claim for DLA on his behalf. On 9 July 2018 the Department's decision maker decided Elliott was entitled to the middle (but not the highest) rate of the care component of DLA for the period from 17 May 2018 to 8 June 2021 (the day before his 5th birthday). Following an unsuccessful request for mandatory reconsideration Elliott, through his mother, appealed.

7. The First-tier Tribunal on 1 April 2019, having dealt with the case at an oral hearing, dismissed the appeal and confirmed the existing level of the DLA award. Elliott's appointee appealed again with the assistance of Ms Jenny Hardwick of Citizens Advice, who had also provided a written submission for the FTT appeal. A District Tribunal Judge gave Elliott's mother permission to appeal to the Upper Tribunal.

The proceedings before the Upper Tribunal

8. Following directions by Upper Tribunal Judge Jacobs, both parties have made written observations on the appeal. The case has now been transferred to me for decision. Neither party has requested an oral hearing of the Upper Tribunal appeal. I do not consider that an Upper Tribunal hearing is necessary or desirable to resolve this appeal. I can summarise the parties' essential arguments as follows.

9. Ms Hardwick's argument, in short, is that the FTT failed to make sufficient findings of fact and/or give adequate reasons in relation to Elliott's need for attention in connection with his communication skills when his parents were trying to settle him back to sleep at night.

10. Mr Kevin O'Kane, the Secretary of State's representative in these proceedings, does not support the appeal to the Upper Tribunal. In taking that position, his argument essentially is that the FTT adequately explained how and why it had reached the conclusion that Elliott did not qualify for the highest rate DLA care component on the basis of night-time care needs aggregated with his (undisputed) day-time care needs.

The Upper Tribunal's analysis

11. In short, I am persuaded by Ms Hardwick's arguments over those advanced by Mr O'Kane.

12. The problems with the FTT's reasoning start at paragraph 9 of its statement of reasons, where it states that in reported (actually unreported) decision CSDLA/567/2005 "it was held that attention given in soothing a child to sleep could be attention in connection with his bodily functions but only if the difficulty in sleeping was caused by a disability". As the full text of this Scottish Social Security Commissioner's decision is not readily and widely available, this proposition was presumably derived from the summary of Mrs Commissioner Parker's decision in Volume 1 of the *Social Security Legislation 2019/20* series (see paras. 1.215 and 1.240). However, the Commissioner's precise words were "Soothing back to sleep can count as attention with a bodily function *provided that the sleeplessness is linked to a disability*" (emphasis added). It seems to me there is a potentially significant difference between the notions of being "linked to a disability" and being "caused by a disability".

13. The decision in CSDLA/567/2005 was taken against the backdrop of the existing well-established case law and notably the reported decision in R(A) 3/78. That case concerned a young boy (Ian) with epilepsy. The Commissioner ruled that to focus only on the disabling condition was too narrow a test. Instead, in deciding whether attention was reasonably required, one had to consider the circumstances created by manifestations of his condition, such as the difficulty in getting the boy back to sleep after he had been disturbed by a fit:

> "10. The entitlement question for the delegated medical practitioner was whether Ian was so severely disabled mentally or physically that at night he required prolonged or repeated attention in connection with his bodily functions. The delegated medical practitioner decided that he did not, because there were no health risks involved in the fits as such, and any harm arising from incontinence could be avoided. In thus testing whether attention was required in connection with bodily functions by considering only whether there was a health risk arising from the two conditions of epilepsy and incontinence, I consider that the delegated medical practitioner was applying an erroneously limited

> test, which he considered was decisive of what he had to decide, namely, was there a requirement for attention in connection with bodily functions?
>
> 11. It is no doubt entirely proper to consider whether a disabling condition is harmful in itself, so as to evidence a requirement for attention in connection with bodily functions. However, in my opinion, it is not sufficient to focus attention exclusively on the limited question of possible harm attached to the disabling condition itself. The whole circumstances in which a disabling condition may manifest itself must be taken into account, since a disabling episode, of itself harmless, may none the less create a situation in which attention is required, not for the disabling condition itself, but in connection with the claimant's bodily functions affected by the circumstances created by the manifestation of the disabling condition. The reality is that any requirement for attention in such a case is by reason of the disablement and the allied circumstances of its manifestation and I see no reason to divorce the one from the other as being causally responsible for any requirement for attention.
>
> 12. Bodily functions are those physical activities essential to the hygiene and well-being of the human body, such as eating, drinking and sleeping. It is quite clear that throughout any night disturbed by fits there was the question of Ian getting back to sleep. His parents attended to him on the occasions of his fits. The delegated medical practitioner found that to withold such attention would be unreasonable, but nevertheless made no findings on the question whether the attention thus given was or was not in connection with the bodily function of sleeping, because, as I conclude, he applied too narrow an approach, and limited his consideration to the possible effects of the fits and incontinence."

14. The present FTT, In the subsequent and lengthy paragraphs 10 and 11 of its statement of reasons, then goes into some detail on the issue of causation. The FTT review the evidence and in effect conclude that Elliott had no functional inability to sleep for longer unbroken periods at night or to get back to sleep again after waking up at night that could be traced back to a physical or mental cause. With respect, that was to ask themselves the wrong question. The question that should have been addressed was that posed by section 72(1)(c)(i) of the Social Security Contributions and Benefits Act 1992, namely whether at night Elliott reasonably required "from another person prolonged or repeated attention in connection with his bodily functions". If he did, then the FTT had to tackle the "additional child test" in section 72(1A)(b). I acknowledge that the FTT made this distinction between sections 72(1) and 72(1A) at paragraph 8 of its reasons, but this lengthy disquisition on causation in a somewhat narrow sense indicates that they took their eye off the ball on the critical issue. It also comes perilously close to breaching the principle that there is no need for a specific physical or mental condition to be identified as the cause of the disability (see reported decision R(DLA) 3/06).

15. In paragraph 12 the FTT then proceed to consider the issue of the additional child test. The FTT reasoned as follows:

> "12. In our judgment there are many children at this age who do not have any physical or mental disability who wake up 2 or 3 times a night regularly and require attention from their parents to get the child settled and back to sleep. We

> considered very carefully whether once awake on occasions during the night there was a traceable link to some physical or mental cause that affected his ability to go back to sleep. His language delay (which obviously and clearly linked to his diagnosed health condition) in our judgment had no bearing on his ability to resume sleeping. There was no other link affecting his ability to sleep that we could attribute to the fact he suffered global developmental delay and was hypermobile. The language delay meant it was more difficult for him to communicate in speech the parent could easily understand when now awake. It did not suggest to us that it affected his ability to go back to sleep. The nature and quality of the attention provided by [the parents] to Elliott taking up to about 30 minutes before the child is settled and falls sleep again seemed to us to be broadly in line with what the parents of a 1 or 2 year old who did not suffer from any physical or mental health condition that affected his ability to sleep would do in getting the child back to sleep once awake in the night."

16. One difficulty with this approach, as Ms Hardwick points out, is that the FTT has not adequately addressed the parents' argument that if Elliott had age appropriate communication skills then he would not need the extra attention at night in order to settle back to sleep. To say that Elliott's language delay did not affect his ability to go back to sleep is to miss the point; the parents' argument was that the language delay meant it was much more difficult to understand what was troubling their child and as such the process of soothing (i.e. the attention in connection with the bodily function) was more protracted. The FTT's focus should have been on the attention required in connection with the bodily function of communication and not of sleeping. A further difficulty with the reasoning is that the comparison made by the FTT is far too loose – their reference point is phrased in very general terms as a "1 or 2 year old", when statute requires a comparison with a child of the same age (here 2 years and 1 month). There is, of course, the world of a difference in sleeping patterns between say a 13-month old and a child almost twice that age.

17. I conclude on balance that the FTT erred in law for the reasons set out above. I therefore allow the Appellant's appeal to the Upper Tribunal, set aside the FTT's decision and remit (or send back) the original appeal for re-hearing to a new and differently constituted tribunal, which must make a fresh decision. I formally find that the previous FTT's decision involves an error of law on the ground as outlined above.

What happens next: the new First-tier Tribunal

18. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal in Plymouth. Although I am setting aside the previous Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the Elliott is entitled to the higher rate of DLA on the basis of his night-time care needs. That is a matter for the good judgement of the new Tribunal. That new FTT must review all the relevant evidence and make its own findings of fact in accordance with the relevant law. In that context I would suggest the new FTT is likely to benefit from the guidance in the decision by Upper Tribunal Judge Hemingway in *DJ v Secretary of State for Work and Pensions (DLA)* [2016] UKUT 169 (AAC) (a decision which, by coincidence, concerned a claim for DLA on the basis of night-time care needs on behalf of a (slightly older) child with hypermobility).

19. In doing so, however, unfortunately the new FTT will have to focus on Elliott's circumstances as they were as long ago as July 2018, and not the position as at the date of the new FTT hearing, which by definition will obviously be more than 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 original decision by the Secretary of State which was appealed to the FTT was taken on 9 July 2018, when Elliott was just over 2 years of age.

20. This is not to say that evidence from after the date of that decision is irrelevant. New evidence may be taken into account by the new FTT to the extent that it sheds light on how matters stood back in July 2018. For example, there might (hypothetically) be a medical specialist's letter from say December 2019 giving a new diagnosis for Elliott which had not been evident in July 2018. Such evidence could be considered, so long as it was likely that the condition so diagnosed was also present (but simply undiagnosed) in July 2018.

21. It follows from all the above that the appeal re-hearing should be a complete re-hearing of the original appeal. This means that as Elliott had just had his second birthday as at the date of the original DWP decision, he will not be eligible for the mobility component of DLA. This is because the minimum age is 3 for the higher rate and 5 for the lower rate of the mobility component (see section 73(1A) of the Social Security Contributions and Benefits Act 1992). So, in practice the remitted appeal should focus on the issue of Elliott's night-time care needs as at July 2018.

Conclusion

22. 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 6 January 2020

Nicholas Wikeley
Judge of the Upper Tribunal