IN THE UPPER TRIBUNAL **Appeal No. UA/2022/001000/PIP**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

DB

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Ovey

Decision date: 6th April 2023
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 2nd February 2022 under number SC266/21/00407 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration.**

2. **The members of the First-tier Tribunal who reconsider the case should be different from those who made the decision of 2nd February 2022.**

3. **The new Tribunal will be looking at the claimant's circumstances at the time of the decision made on 22nd June 2017. Any further evidence should shed light on the position at that date.**

4. **The issues to be considered by the new Tribunal are those raised by the claimant in his application for mandatory reconsideration made on 7th July 2021.**

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 is an appeal brought by the claimant against the decision of the First-tier Tribunal given on 2nd February 2022. That decision was made on an appeal by the claimant brought following a decision made by the Secretary of State on 5th June 2021 in relation to a claim by him for personal independence payment ("PIP"). The Secretary of State's decision was made as part of an administrative exercise known as a LEAP exercise (the acronym stands for Legal Entitlements and Administrative Practices) under which PIP claims by a large number of claimants have been re-examined as a result of the decisions of the Upper Tribunal in *MH* v. *Secretary of State for Work and Pensions* [2018] A.A.C.R. 12 and *RJ* v. *Secretary of State for Work and Pensions* [2017] A.A.C.R. 32. *MH* was decided on 28th November 2016 and *RJ* on 9th March 2017.

2. A LEAP exercise, in this context, is an administrative exercise which is undertaken by the Department of Work and Pensions ("DWP") as a matter of good administration when it becomes apparent that claimants have not been receiving benefits to which they are entitled because the administrative practice adopted in relation to a benefit has not been in accordance with the governing legislation. Several such exercises have been carried out in recent years. *MH* and *RJ* were both decisions to the effect that the DWP's construction of some of the descriptors in the Social Security (Personal Independence Payment) Regulations 2013, S.I. 2013 No. 377, ("the PIP Regulations") used for purpose of determining a claimant's entitlement to PIP was erroneous.

3. In summary, it was decided in *MH* that in relation to mobility activity 1 a claimant's psychological distress could be relevant to descriptors 1(c), 1(d) and 1(f), as well as to descriptors 1(b) and 1(e), which expressly refer to "overwhelming psychological distress". The DWP's practice had been not to consider distress in connection with descriptors where it was not expressly mentioned. It was decided in *RJ* that in assessing, in accordance with reg. 4(2A) of the Regulations, whether a claimant could carry out an activity "safely" the decision maker should consider whether there was a real possibility of harm which could not be ignored having regard to the nature and gravity of the feared harm. The DWP's practice had been to consider simply whether harm was more likely than not to occur.

4. The Secretary of State appealed against both decisions and in addition the descriptors in mobility activity 1 were amended to reverse the effect of *MH* by the Social Security (Personal Independence Payment) (Amendment) Regulations 2017, S.I. 2017 No. 194, ("the Amendment Regulations") which on their face came into force on 16th March 2017. Those Regulations, however, were quashed by Mostyn J. on 21st December 2017 in *R. (on the application of RF)* v. *Secretary of State for Work and Pensions* [2018] A.A.C.R. 13 on the grounds that they were (i) in breach of article 14 of the European Convention on Human Rights and so unlawful, (ii) ultra vires the power to make regulations contained in the Welfare Reform Act 2012 which introduced PIP and (iii) unlawful as a result of the Secretary of State's failure to consult. The Amendment Regulations, so far as material to this appeal, are thus of no effect and the relevant law is to be taken as having always been the law as stated in *MH*, subject to the statutory qualifications which I explain later. This is explained

by Judge Jacobs in *YA* v. *Secretary of State for Work and Pensions (PIP)* [2022] UKUT 143 (AAC).

5. The Secretary of State then withdrew both the appeals and embarked on the LEAP exercise which, as a matter of good administration, was obviously required. As explained in a statement on the progress of that exercise published by the DWP on 14th December 2021, *MH* could affect all decisions on mobility activity 1, although claimants were unlikely to benefit from the decision unless one of their identified medical conditions was a psychological disorder. *RJ* could affect the assessment of any activity, although in the DWP's view claimants were unlikely to benefit from the decision unless they had a neurological disorder. Since the decisions were not immediately implemented in the DWP's decision-making processes, the exercise extended to claims made after the decisions as well as before. It further appears from the statement that at a point not clearly identified before December 2021 there was a change of approach on the part of the DWP so that the cases of claimants assessed as less likely to benefit did not receive "a review", but rather the DWP wrote to the claimant offering the opportunity to receive a review.

6. It is unfortunately the case that where "a review" has been carried out but has not led to any change in the decision being reviewed, the law governing the claimant's ability to challenge the DWP's view of his or her legal entitlement is complex. This is amply illustrated by the decisions in *PH* v. *Secretary of State for Work and Pensions (DLA)* [2018] UKUT 404 (AAC), [2019] A.A.C.R. 14, *CM* v. *Secretary of State for Work and Pensions* [2020] UKUT 221 and *GJ* v. *Secretary of State for Work and Pensions (PIP)* [2022] UKUT 334 (AAC), to all of which I refer below. Before embarking on an attempt to analyse the relevant law, however, I turn to the facts of the present case.

The facts

7. On 10th March 2017 the claimant made a telephone claim to PIP. As can be seen from what is said above, the claim was therefore made after the decisions in *MH* and *RJ*.

8. The claimant's PIP2 form (How your disability affects you) was received on 30th March 2017 and identified his medical conditions as diabetes and epilepsy. The claimant did not identify himself as having any difficulties which would lead him to satisfy any point-scoring descriptors under the PIP Regulations other than that he needed to use an aid or appliance in connection with managing therapy or monitoring a health condition. He did not explain what aid or appliance he needed and why he needed it.

9. The claimant's G.P. provided medical evidence dated 30th May 2017 giving his "disabling conditions" as alcohol intake, which was said to be variable, epilepsy and diabetes and stating that he was receiving support to reduce his alcohol intake, his epilepsy was stable and he was under the practice nurse for diabetes. His conditions were said to be variable depending on his alcohol intake, which would affect the risk of epilepsy and his diabetic control. The effects of the disabling conditions on day to day life were described as "Variable, but nil recorded on no ability to undertake tasks".

10. On 10th June 2017 the claimant attended a PIP consultation, at which he reported that he had been diagnosed with leukaemia in 2012 and had had chemotherapy but was currently in remission, although still receiving medication. He said he was not seeing the mental health services "at present", a comment which seems to have gone unexplored. In the light of what the claimant said about the various activities and the health professional's own exercise of judgment, it was concluded that he did not have difficulties with any of the specified activities. That conclusion coincided with what the claimant had said when completing form PIP2, with the exception of his need to use an aid or appliance. The health professional read the form as stating that the claimant used a dosette box (although that is given as an example of what an aid or appliance might be) and did not agree that he needed one.

11. On the basis of that material, the decision maker decided on 22nd June 2017 that the claimant scored 0 points in relation to the various activities and was not entitled to either the daily living component or the mobility component of PIP at any rate. I shall refer to this decision as "the 2017 Decision". It was clearly made before the Amendment Regulations were quashed by Mostyn J. and before the Secretary of State withdrew the appeals against the decisions in *MH* and *RJ*. The notice of the decision included the information that an appeal could only be brought following an application for mandatory reconsideration. The submission to the First-tier Tribunal includes a statement that the decision was disputed at the time, but the papers before me contain no further trace of any challenge to the decision and I therefore proceed on the basis that whatever may have happened is not relevant for present purposes.

12. As far as appears from the papers before me, the claimant then made a further telephone claim for PIP on 31st August 2018 and received a negative determination dated 11th October 2018 based on his failure to provide further information.

13. On 28th March 2019 the claimant again made a telephone claim for PIP. He completed another form PIP2, this time giving as his conditions diabetes, epilepsy, leukaemia of unspecified cell type, alcoholism and depression, for which he gave an approximate start date of 2018-2017 (*sic*). In other respects there was no change in the form, except that he said he could only walk between 50 and 200 metres.

14. On 8th September 2019 the claimant again attended a PIP consultation. The history of his conditions contains some more information about seizures, to the effect that his last major seizure was two to three years previously and that he had petit mal seizures three or four times a year, with about a minute's warning so that he could sit down quietly somewhere. It is also stated that his depression was diagnosed by his G.P. "a few years ago" due to his bereavement and financial circumstances, but he had not been on any medications or treatment "for a few years now". The claimant was working for 14 to 15 hours a week, which was not the case in 2017, when he reported that he had had to give up work in 2012 owing to sickness. The health professional specifically considered safety issues in relating to the activities of preparing food and washing and bathing in the light of the information about the claimant's epilepsy. The conclusion reached was in practical terms the same as the conclusion in 2017, since the health professional did not agree that the claimant's walking was limited to 50 to 200 metres.

15. In connection with this report, I note that there was a "follow up telephone call" on 18th September 2019 which was apparently recorded in a "continuation". I have not been able to identify the continuation in the papers.

16. Again, in a decision dated 9th October 2019, the decision maker decided that the claimant scored 0 points in relation to the various activities and was not entitled to either the daily living component or the mobility component of PIP at any rate.

17. The claimant made a further telephone claim to PIP on 25th January 2021 and filled in a further form PIP2. In that form he stated that his health and mental health had been deteriorating at a rapid pace since early 2020 and added as health conditions agoraphobia and insomnia. He said he needed help with cooking because he could black out at any time. He no longer needed an aid or appliance in connection with managing his treatment, a change which seems to be explained by his statement that with the help of his diabetic nurse he had learned to monitor his condition. In relation to washing and bathing he referred to an application for a walk-in shower, supported by his G.P. on the ground, in summary, that it was not safe for him to take a bath. He said that he found it difficult to mix with other people because of severe anxiety or distress, explaining "I've learned to live and be on my own". He also said that he was unable to go out because of severe anxiety and distress, referring to his agoraphobia. He did not identify any other specific needs, but in the extra information sections on the form mentioned that he sometimes had toilet accidents, that he struggled to make himself clear because he talked very slowly and that he struggled to move around.

18. The accompanying medical report from the claimant's G.P., dated 6th February 2021, records that in 2015 he was the carer for his partner who was dying of ovarian cancer and on 21st December 2016 that the claimant was referred to a counsellor.

19. Owing to Covid restrictions, the claimant's PIP consultation took place over the telephone. It was held on 5th May 2021. It appears from the report that the claimant was noticeably more vague (although he is described as showing no evidence of cognitive impairment and as being "fully alert"), but the impression given is that his petit mal attacks had become more severe. There is reference to his having "come to and banged his head but no traumatic injuries where he has needed to go to hospital for treatment". He was no longer working and could not recall when he last worked or what he did. The health professional assessed the claimant as having no difficulty with any of the activities, reaching the conclusion specifically that the risk of harm (presumably from the effects of epilepsy) was low.

20. The DWP also obtained a copy of a medical report form dated 21st June 2017 in relation to a claim by the claimant for employment and support allowance ("ESA"). I note that the form identified as conditions from which the claimant was suffering in 2017 not only diabetes and epilepsy but also leukaemia, a mental health problem, irritable bowel syndrome, high cholesterol, a skin problem and a visual problem. It also contains a yet further account of, in particular, the effects of his epilepsy and his mental health problem. He was found to have an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration at least once a month. That is to say, he satisfied one of the point-scoring descriptors used in connection with the determination of entitlement to ESA, although in isolation it would not be sufficient to establish entitlement. It appears from the Secretary of State's submission to the Tribunal in the present case that the claimant

was in fact previously entitled to ESA and at the date of the submission was entitled to universal credit.

21. A further decision that the claimant scored 0 points and was not entitled to an award of either component of PIP at any rate was made on 18th May 2021. It appears that the claimant had not taken steps to challenge that decision at the date of the hearing before the Tribunal with which I am concerned.

22. The next event in the chronology is that on 5th June 2021 a letter described as a "Segmentation (Administrative Exercise decision) letter" was sent to the claimant. This was, as I understand it, the LEAP decision letter. Curiously, as the submission identifies that decision as the decision against which the appeal to the Tribunal was brought, it is not included in the bundle. That is unfortunate. The Tribunal had to proceed on the basis that, as explained in the submission, the decision maker "looked at" the 2017 Decision again, taking into account both *MH* and *RJ*, but decided "not to revise [it] in light of the change in the judgements".

23. In response to that letter, the claimant telephoned the DWP on 7th July 2021. No record of the call appears in the bundle as such, but what appears to be a full record is set out in the submission itself. It states that the claimant requested "Mandatory Reconsideration for both MH & RJ". He referred specifically to having epilepsy, giving details of both seizures and petit mal fits, and said that he thought he was on anti-depressants between 28th November 2016 and 28th June 2018. He was told that the information given would be noted for the mandatory reconsideration.

24. On 7th August 2021 the mandatory reconsideration decision letter was sent to the claimant. It is a decision that the claimant was not entitled to PIP for his daily living needs or his mobility needs from 10th March 2017. It states that the decision maker looked at all the information available, including the form PIP2 and the extra information the claimant provided, to look at whether he could carry out 12 activities and the amount of help he needed. Again the claimant scored 0 points. The decision records that the claimant asked the DWP to look at his claim again as he disagreed with "the decision made recently following the changes in PIP law" and deals separately with the two cases. As respects *RJ*, the reasoning refers only to the claimant's form PIP2 dated 26th March 2017, the PIP assessment on 10th June 2017 (the decision in fact says 10th June 2016, but that is plainly a mistake) and the information from the G.P. dated 30th May 2017. As respects *MH*, the reasoning refers only to the same form and assessment and to the consultation on 21st July 2017 (presumably a mistake for 21st June 2017). There is no reference to the information given when the claimant requested reconsideration. The decision concludes by stating that the 2019 and 2021 PIP decisions are not affected because the changes in PIP law were taken into consideration at the time.

25. The information accompanying the decision told the claimant that he was entitled to appeal to the Tribunal. He did so by an appeal form received on 6th October 2021 in which he explained that he had spoken briefly to Citizens Advice and that he believed he had "misrepresented" himself and needed to put the record straight. Later he made clear that the misrepresentation applied to the "first claim". Much of what was said in the appeal notice appears to relate to his then current state, but he did refer to having been diagnosed with depression by his G.P. after the death of his live-in girlfriend/partner, which then deteriorated. Pages 8 to 12 in the bundle, which seem to have formed part of the appeal form, are marked as "missing

page" and it is unclear what was on the original, but at present I do not think that they were material.

26. The papers before me also include what is described as additional evidence from the claimant, which seems in fact from the poor quality copies I have to be a repetition of what is said in the grounds of appeal together with the medical information provided in respect of his 2021 PIP claim.

27. A remote hearing of the appeal was held on 2nd February 2022 and the appeal was dismissed.

28. A statement of reasons was requested by the claimant and was sent to him on 25th April 2022. The claimant then applied for permission to appeal by an email sent on 11th May 2022, stating that "the tribunal was not looking at the right evidence which was in 2017" and apparently sent further evidence, possibly relating to medication for pain relief and inflammation in his knee. Unfortunately the pages labelled "Addition E ¦ Pages 3 to 6" are completely illegible.

29. Permission to appeal was refused by the District Tribunal Judge on 27th May 2022. The claimant then renewed his application to the Upper Tribunal by a form dated 5th July 2022 and received on 25th July 2022. The grounds of appeal were a repetition of the grounds of appeal to the First-tier Tribunal. There is also some further medical evidence in the form of a letter dated 16th April 2019 from the claimant's G.P. which gives some past history.

30. The application for permission to appeal was considered by Judge Hansen, who decided on 31st October 2022 to grant permission. Judge Hansen set out the background in some detail and if necessary extended time for the application for permission to the Upper Tribunal. No objection has been taken on the ground of lateness to either the application for mandatory reconsideration or the appeal to the Tribunal and although at first sight it appears there may have been a small degree of lateness, I shall proceed on the footing that the Secretary of State is content for the substance of the matter to be considered. Judge Hansen clearly felt doubts about the merits of the appeal, but granted permission on the basis that he was "*just* persuaded" that there were arguable errors of law in the Tribunal's decision:

> (1) In relation to its failure to consider the appeal on its merits, which the Tribunal considered it could not do;
>
> (2) In its failure to consider the matters raised in the telephone conversation of 7th July 2021.

31. The appeal is supported by the Secretary of State, who agreed that the Tribunal had erred in its consideration of jurisdiction and in failing to consider the telephone call, and submitted that the decision should be set aside and remitted to a freshly constituted Tribunal.

32. Although I accept the Secretary of State's submission as to the correct disposition of this appeal, there are several difficult underlying procedural issues which in my view require a more detailed exploration than is contained in the submission and I now turn to explain why that is so.

Procedure: general

Revision and supersession

33. As explained by Judge Wright in *CM* v. *Secretary of State for Work and Pensions (PIP)*, and as recognised by the Tribunal in the present case, there are two possible powers which the Secretary of State might exercise when deciding to "look again" at a previous decision with a view to changing it. (The expression "look again" is not a statutory term, but it is a convenient description of the exercise being undertaken by the Secretary of State.) Both powers are contained in the Social Security Act 1998. The first is the power to revise a decision given by s.9 and the second is the power to supersede a decision given by s.10. In the broadest terms, the conceptual difference between revision and supersession is that a revision changes the original decision and supersession replaces it for the future. Unfortunately, numerous technicalities surround the whole area, some of which tend to obscure the basic conceptual difference.

34. Under s.9:

> "(1) Any decision of the Secretary of State … may be revised by the Secretary of State –
>
> (a) either within the prescribed period or in prescribed cases or circumstances; and
>
> (b) either on an application made for the purpose or on his own initiative
>
> and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Subject to subsections (4) and (5) and section 27 below, a revision under this section shall take effect as from the date on which the original decision took (or was to take) effect.
>
> (4) Regulations may provide that, in prescribed cases or circumstances, a revision under this section shall take effect from such other date as may be prescribed.
>
> (5) Where a decision is revised under this section, for the purpose of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it is so revised.
>
> (6) …"

35. In a case concerning entitlement to PIP, one turns to the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, S.I. 2013 No. 381, ("the D&A Regulations") to flesh out s.9(1). The D&A Regulations distinguish between what is called "revision on any grounds", which is the subject of Chapter 1 of Part 2, and "revision on specific grounds", which is the subject of Chapter 2.

36. Reg. 5, in Chapter 1, provides that any decision of the Secretary of State may be revised by the Secretary of State if the Secretary of State commences action leading to the revision within one month of the date of notification of the original

decision or if an application for a revision is received by the Secretary of State at an appropriate office within one month of the date of notification (or slightly later in certain cases where a statement of reasons has been requested) or such longer period as may be allowed under reg. 6. Reg. 6 permits the Secretary of State to extend time for making an application for revision on certain conditions, of which the material one is that the application is made within 12 months of the latest date by which the application should have been made under reg. 5. Those provisions are frequently referred to as imposing a 13 month absolute time bar on applications by the claimant for revision on any grounds.

37. Reg. 8, in Chapter 2, provides that a decision may be revised at any time by the Secretary of State in any of the cases and circumstances set out in that Chapter. The relevant regulation is reg. 9(a), which allows a decision to be revised where the decision arose from official error, which is defined in reg. 2 as follows:

> " "official error" means an error made by –
>
> (a) an officer of the Department of Work and Pensions or HMRC acting as such which was not caused or materially contributed to by any person outside the Department or HMRC;
>
> (b) …
>
> but excludes any error of law which is shown to have been such by a subsequent decision of the Upper Tribunal, or of the court as defined in section 27(7) of the 1998 Act".

S.27(7) defines "the court" to include the High Court, the Court of Appeal and the Supreme Court.

38. S.27 also contains what is sometimes called "the anti-test case rule". Under s.27(1), the rule applies where:

> "(a) the effect of the determination, whenever made, of an appeal to the Upper Tribunal or the court ("the relevant determination") is that the adjudicating authority's decision out of which the appeal arose was erroneous in point of law; and
>
> (b) after the date of the relevant determination a decision falls to be made by the Secretary of State in accordance with that determination (or would, apart from this section, fall to be so made) -
>
> (i) in relation to a claim for benefit;
>
> (ii) as to whether to revise, under section 9 above, a decision as to a person's entitlement to benefit; or
>
> (iii) on an application made under section 10 above for a decision as to a person's entitlement to benefit to be superseded."

The substance of the rule, for present purposes, is to be found in subs.(3), which provides that in so far as the decision relates to a person's entitlement to a benefit in respect of a period before the date of the relevant determination, it shall be made as if the adjudicating authority's decision had been found by the Upper Tribunal or court not to have been erroneous in point of law.

39. When these various provisions are applied to the LEAP exercise currently under consideration, it can be seen that a potential difficulty emerges. Clearly the Secretary of State will not usually be seeking to exercise the any grounds power under reg. 5, since that carries a very short time limit where the exercise is on the Secretary of State's own initiative. The obvious source of the power is the reg.9(a) power to revise on the ground of official error. The effect of the definition of official error, however, is that there was no such error in relation to any case where the original decision was made before the date of the decisions in *MH* and *RJ*. This is the point on revision made by Judge Wright in *CM*.

40. It follows that in order to achieve the object of the LEAP exercise in such circumstances the Secretary of State has to turn to the power of supersession in s.10, which reads as follows:

> "(1) Subject to subsection (3) below, the following, namely –
>
> (a) any decision of the Secretary of State …
>
> may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
>
> (2) In making a decision under subsection (1) above, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.
>
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
>
> (4) …
>
> (5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.
>
> (6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may prescribed.
>
> (7) …"

41. The D&A Regulations deal with supersession in Part 3. Chapter 1 contains the grounds for supersession and the material one for present purposes is reg.24, which provides that a decision of the Secretary of State may be superseded where the decision was wrong in law and an application for supersession was received, or a decision was taken by the Secretary of State to act on the Secretary of State's own initiative, more than one month after the date of notification of the decision to be superseded or after the expiry of such longer period as may have been allowed under reg. 6. The expression "wrong in law" is not defined and so a decision on a PIP claim made before the decisions in *MH* and *RJ* may be wrong in law, through the application of an erroneous legal test.

42. If the usual rule in s.10(5) of the 1998 Act as to the date from which a supersession decision takes effect applied, this would obviously be a poor substitute for revision on the ground of official error. Reg. 35, however, contains exceptions to that rule, as envisaged by s.10(6), and reg. 35(5) provides:

> "A superseding decision made in consequence of a decision which is a relevant determination for the purposes of section 27 of the 1998 Act … takes effect from the date of the relevant determination."

It follows that the Secretary of State may supersede a decision on a PIP claim affected by *MH* or *RJ* or both with effect from the date of the relevant decision or decisions.

43. The Secretary of State cannot, however, adopt that means of dealing with cases where the decision being looked at was made after the date of *MH* or *RJ* or both, as the case may require. That is because in such cases the power of review under reg.9(a) exists and reg. 32 provides that in such circumstances the decision may not be superseded.

Rights of appeal

44. At this point, a further difficulty emerges in cases in which the Secretary of State has conducted a review of the original decision but has not changed it. It was established by the Court of Appeal's decision in *R(DLA) 1/03* (*Wood* v. *Secretary of State for Work and Pensions* [2003] EWCA Civ 53) that s.12 of the Social Security Act 1998 gives a right of appeal against a decision refusing to supersede an earlier decision. Conversely, it was decided by a Tribunal of Commissioners in *R(IS) 15/04* first that, as is clear from s.12 itself, there is no right of appeal against a decision under s.9 and instead any appeal has to be brought against the original decision and secondly that, since the regulations then applying did not extend the time for appealing to the date of the s.9 decision in the case of a refusal to revise on the ground of official error, there was no right of appeal if, at that date, the claimant was then out of time for appealing against the original decision. (If the claimant is not out of time, then the claimant should of course simply appeal against the original decision if there is a refusal to review it.)

45. There is an obvious asymmetry here which seems capable of producing anomalous distinctions. There is no doubt that the DWP did not change its administrative practice immediately upon the handing down of the decision in either *MH* or *RJ* and for many months afterwards decisions were made on the basis of the law as it was previously understood. If, however, the LEAP exercise properly carried out requires the Secretary of State to supersede (where appropriate) decisions made before 28th November 2016 as respects *MH* issues and before 7th March 2017 as respects *RJ* issues, but to revise (where appropriate) decisions made after those dates, some claimants will have a right of appeal against a refusal to change their original decision and others will not.

46. This situation has been ameliorated by a combination of the introduction of mandatory reconsideration procedures by the Welfare Reform Act 2012 and the decision of Judge Poole in *PH* v. *Secretary of State for Work and Pensions (DLA)*.

47. S.12 of the 1998 Act now reads as follows:

> "(1) This section applies to any decision of the Secretary of State under section 8 or 10 above [i.e., not under section 9] … which –
>
> (a) is made on a claim for, or on award of, a relevant benefit …

(2) In the case of a decision to which this section applies, the claimant … shall have a right to appeal to the First-tier Tribunal …

(3) …

(3A) Regulations may provide that, in such cases or circumstances as may be prescribed, there is a right of appeal under subsection (2) in relation to a decision only if the Secretary of State has considered whether to revise the decision under section 9.

(3B) to (6) …

(7) Regulations may –

(a) make provision as to the manner in which and the time within which appeals are to be brought;

(b) provide that, where in accordance with regulations under subsection (3A) there is no right of appeal against a decision, any purported appeal may be treated as an application for revision under section 9.

(8) In deciding an appeal under this section, the First-tier Tribunal –

(a) need not consider any issue that is not raised by the appeal; and

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

(9) The reference in subsection (1) above to a decision under section 10 above is a reference to a decision superseding any such decision as is mentioned in paragraph (a) or (b) of subsection (1) of that section."

Subs.(9) is the provision construed in *R(DLA) 1/03* as giving a right to appeal against a refusal to supersede.

48. The regulations contemplated in subs.(3A) are to be found in reg. 7 of the D&A Regulations. It provides:

"(1) This regulation applies in a case where –

(a) the Secretary of State gives a person written notice of a decision under section 8 or 10 of the 1998 Act (whether as originally made or as revised under section 9 of that Act); and

(b) the notice includes a statement to the effect that there is a right of appeal in relation to the decision only if the Secretary of State has considered an application for a revision of the decision.

(2) In a case to which this regulation applies, a person has a right of appeal under section 12(2) of the 1998 Act in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of that Act.

…"

49. Identical provisions are to be found in reg.3ZA of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, S.I. 1999 No. 991, and were the subject of careful consideration in *PH* v. *Secretary of State for Work and Pensions.* The cases before Judge Poole raised the question what effect the distinction between "any ground" revisions and "any time" revisions had on the extent of the First-tier Tribunal's jurisdiction to hear appeals when mandatory reconsideration of a decision notified in accordance with reg. 3ZA(1) is requested after 13 months (i.e., the time after which an "any ground" application for revision would be time-barred).

50. The first point I draw from the decision is that if what appears to be an application for review is not considered because it is time-barred, the terms of reg.7(2) of the D&A Regulations (corresponding to reg. 3ZA(2) of the 1999 Regulations) are not satisfied and the First-tier Tribunal therefore has no jurisdiction to hear the appeal. It was suggested in *R. (CJ) and SG* v. *Secretary of State for Work and Pensions* [2018] A.A.C.R. 5, again a decision of a Tribunal of Commissioners, that in such circumstances the request for revision did not constitute "an application for revision" for the purposes of the regulations and Judge Poole adopted that approach. It is to be noted that the actual decision in *R. (CJ)* was that where an application for revision was late but not outside the 13 month period, and the Secretary of State refused to revise the original decision on the ground that the application did not satisfy the criteria for extending time, there was a right of appeal against the original decision. The underlying reasoning was that in considering whether or not to extend time, the Secretary of State had "considered whether to revise" the original decision for the purposes of s.12(3A).

51. The second point I draw from the decision is that when an application for review is an application for an "any time" revision there is, self-evidently, no applicable time limit and thus no basis for a contention on time grounds that the application is not "an application for revision" within the regulations. Judge Poole concluded that there is a right of appeal where the application for revision is made on the ground of official error and the Secretary of State refuses to review the original decision. In other words, the First-tier Tribunal has jurisdiction to hear the appeal. This seems to me consistent with the approach taken in *R.(CJ)*.

52. The third point I draw from the decision is that the First-tier Tribunal is not bound by the parties' classification of an application as an "any ground" application or an "any time" application. If jurisdiction is in issue, the Tribunal will have to consider the nature of the application as shown by its substance. Judge Poole also envisaged as a possibility that if there is no arguable case of official error, the Tribunal may find that there is no properly constituted "application for review" in the case of what purports to be an "any time" application. As I shall explain, I do not need to consider whether this last proposition is correct.

53. A would-be appellant still has to comply with the time limits applying to the bringing of an appeal, as opposed to applying for a revision. At the time of the decision in *R(IS) 15/04* the time limits were found in reg. 31 of the 1999 Regulations, but that regulation was revoked as part of the changes following from the passing of the Tribunals, Courts and Enforcement Act 2007 and the relevant provisions are now to be found in rule 22 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, S.I. 2008 No. 2685. So far as material, rule 22 provides:

"(2) An appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received –

(a) - (c) …

(d) in other cases –

(i) if mandatory reconsideration applies, within 1 month after the date on which the appellant was sent notice of the result of mandatory reconsideration;

(ii) …

(3) – (7) …

(8) Where an appeal in a social security and child support case is not made within the time specified in paragraph (2) –

(a) it will be treated as having been made in time, unless the Tribunal directs otherwise, if it is made within not more than 12 months of the time specified and neither the decision maker nor any other respondent objects;

(b) …

(9) For the purposes of this rule, mandatory reconsideration applies where –

(a) the notice of the decision being challenged includes a statement to the effect that there is a right of appeal in relation to the decision only if the decision maker has considered an application for the revision, reversal, review or reconsideration (as the case may be) of the decision being challenged; or

(b) …".

A social security and child support case is defined in rule 1(3) as any case allocated to the Social Entitlement Chamber other than an asylum support case or a criminal injuries compensation case.

54. These provisions were also considered by Judge Poole in *PH*. She noted that mandatory reconsideration did apply in the cases before her, because the notices given contained statements about mandatory reconsideration, and the effect was that the clock was reset where the Tribunal had jurisdiction to hear the appeal. In cases involving revision on the ground of official error, claimants now have the extension of time in cases of refusal to revise which was found to be missing in *R(IS) 15/04*.

55. It is to be noted that it is the notice of the original decision which must contain the mandatory reconsideration statement in the case of an application to revise for official error, since the decision being challenged is the original decision, in respect of which s.12 grants a right of appeal, rather than the refusal to revise. The mandatory reconsideration regime does not affect the point that there is no statutory right of appeal against a decision under s.9.

56. By this somewhat complex route, the position has been reached in PIP claims that although there is no statutory right to appeal against a refusal to revise, by contrast with the position in relation to a refusal to supersede, the time for appealing the original decision runs from the date of the mandatory reconsideration

determination rather than the date of the original decision. In practice, therefore, the risk of anomalies is largely removed, subject to the point considered in the following paragraph.

57. The final issue of this procedural type (which does not arise in the present case and did not arise in *R(DLA) 1/03*) is whether or not a decision refusing a claim can be superseded. On the face of the legislation it is difficult to see why that should not be possible. S.10(1) provides that any decision of the Secretary of State under s.8 may be superseded and a decision that a claimant is not entitled to PIP is certainly a decision under s.8.

58. This view is both supported as a general matter and qualified in a particular respect by s.8(2), which provides:

> "Where at any time a claim for a relevant benefit is decided by the Secretary of State –
>
> (a) the claim shall not be regarded as subsisting after that time; and
>
> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time."

59. S. 8(2) was considered by a Tribunal of Commissioners in *R(I) 5/02*. As explained in paragraph 30 of the decision, s.8(2)(a) reversed the rule that a claim leading to an award continued throughout the period of the award and a tribunal was thus able to take into account circumstances down to the date of the tribunal hearing, even where those circumstances did not exist at the date of the decision. It has a counterpart in s.12(8)(b), under which the tribunal cannot take into account any circumstances which were not obtaining when the decision was made.

60. S.8(2)(b), it was explained, has to be construed on the footing that it states a consequence of the fact that the claim no longer subsists after the decision is made. A decision that a claimant is not entitled to a benefit relates to the period from the date of the claim to the date of the decision. It follows it cannot be changed by reference to a relevant change of circumstances occurring after the date of the decision, because the change would not be relevant to the period covered by the decision. In paragraph 32 the Tribunal of Commissioners decided that s.8(2)(b) codified the rule which would have applied in any case and set it on a new basis as the consequence of the claim's ceasing to exist.

61. In paragraph 31, however, it was pointed out that s.10 is concerned with the supersession of a decision and a decision may exist after the claim in relation to which it was made has ceased to subsist. A decision may also have to be made under a relevant enactment independently of any claim. S.8(2)(a) is therefore not to be regarded as imposing limitations on the scope of supersession. In particular in the present context, it would not preclude the supersession of a decision refusing a claim to PIP made before the decisions in *MH* and *RJ* on the basis of the law as the DWP then believed it to be.

The decision of the First-tier Tribunal

62. In the light of the foregoing, the position in relation to this case was:

(1) When the DWP came to "look again" at the claimant's case as part of the LEAP procedure, the question was whether it should revise the 2017 Decision under s.9 of the Social Security Act 1998 and reg. 9 of the D&A Regulations on the ground of official error. That was because the decision was made after both *MH* and *RJ*;

(2) Following the DWP's decision not to revise the 2017 Decision the claimant had no right of appeal against that decision, in the light of *R(IS) 15/04*. The question was whether he still had a right to appeal against the 2017 Decision itself;

(3) The claimant did have such a right of appeal if in substance he had applied for mandatory reconsideration on the ground of official error, that being an "any time" ground for revision, and (putting the hurdle at its highest) the ground was arguable. That was because there was then a properly constituted application for revision which had been considered by the Secretary of State, as decided in *PH*;

(4) The claimant still had to comply with the time limits for bringing an appeal set out in rule 22 of the Tribunal Procedure Rules, but the crucial date from which the time limits were to be calculated was the date of notification of the mandatory reconsideration decision rather than the date of the 2017 Decision, again as decided in *PH*.

63. It is understandable, given the procedural background that I have described, that the Secretary of State's submission to the First-tier Tribunal did not identify the position and issues in the way I have done in the preceding paragraph. This may, however, have led to what in my view was a degree of error by the Tribunal.

64. In Section 3 of the submission, the decision under appeal was identified as the decision dated 5th June 2021: that is, the decision refusing to revise the 2017 Decision. It is then stated:

> "The decision was made not to revise under regulation 1R (DLA) 103."

I take it that the intended reference is to *R(DLA) 1/03*. As I have said, however, that is a decision recognising the right to appeal against a refusal to supersede rather than a refusal to revise and it has no relevance here.

65. The reason for the decision said to be under appeal was stated to be that the changes in the law arising from the decisions in *MH* and *RJ* did not affect the decision already in place. That is, of course, a perfectly proper reason for refusing to revise the 2017 Decision.

66. The submission dealt with time limits in Section 4 "because the claimant appears to be raising matters decided in the decision made on 22/06/2017". Reference was made to the time limit in regs. 5 and 6 of the D&A Regulations (i.e., the "any ground" time limit), but no reference was made to reg. 9 and the possibility of an "any time" application for revision. It was correctly stated that there is an absolute time limit for appealing of 13 months from the notification of the mandatory reconsideration decision. The submission then continued:

> "The decision was made on 22/06/2017, this was disputed at the time and there is no indication of official error. Any appeal against the original decisions

as decided are therefore outside of the basic 13-month period and is not an issue that can be considered by the Decision Maker or the Tribunal."

67. This statement must be read bearing in mind that the submission went on to explain how the decisions in *RJ* and *MH* had been considered and (briefly) the reasons why they were thought not to affect the 2017 Decision. The material referred to in this connection consists of the PIP2 form dated 26th March 2017, the face to face assessment on 10th June 2017, the information from the claimant's G.P. given on 30th May 2017 and, in relation to *MH*, the information from the ESA assessment on 21st June 2017 (for which the date of 21st July 2017 is mistakenly given). There is no reference to the information given in the telephone call on 7th July 2021 or to the grounds of appeal.

68. The crucial part of the First-tier Tribunal's statement of reasons is as follows:

> "12. … In this case the Upper Tribunal decisions of MH and RJ were made before the decision of 22 June 2017. As such the Tribunal had to consider whether [the claimant] could have applied for the original June 2017 decision to be revised on the grounds of official error.
>
> 13. No official error is identified by either party. The decisions of MH and RJ would have been known to the SSWP at the time of the decision on 22 June 2017; in any event those decisions simply declared what the law always had been. There is no evidence before the Tribunal of what the official error would have been. As such the Tribunal did not accept, on the balance of probabilities, that there was an official error. In those circumstances any request to revise would have to have been made within the ordinary 13 month time limit (PH and SM v SSWP [2018] UKUT 404 (AA) considered).
>
> 14. On 5 June 2021 the SSWP reconsidered the decision of 22 June 2017 and decided not to revise that decision. There is no right to appeal against a refusal to revise in those circumstances (as outlined in the decision of R(IS) 15/04)."

The appeal to the Upper Tribunal

69. I have explained in paragraphs 29 and 30 above the grounds of the claimant's present appeal and the reasons for which Judge Hansen gave permission to appeal, namely, that the Tribunal arguably erred in law in its view on jurisdiction, leading to a failure to consider the appeal on its merits, and in failing to consider the matters raised in the telephone conversation on 7th July 2021. I turn now to consider in more detail the Secretary of State's submission dated 8th December 2022.

70. As to the jurisdiction point it is submitted that the key question is whether the decision of 7th August 2021 on mandatory reconsideration gave rise to a right of appeal against the 2017 Decision or the initial LEAP decision. In fact, however, the submission then deals solely with the question whether there was a right of appeal against the 2017 Decision. I agree that that was the key question.

71. The Secretary of State submits that "the claimant's grievance extended to" the 2017 Decision and again I agree. The terms of the telephone conversation on 7th July 2021 put that beyond doubt.

72. The Secretary of State then submits that:

(1) there was thus an application for revision of the 2017 Decision;

(2) the application gave rise to a right of appeal if and only if it was in substance a request for an "any time" revision;

(3) there was an application for an "any time" revision if and only if the request advanced an arguable, non-hopeless case in support of the proposition that an "any time" ground was satisfied.

73. I agree with (1) and (2) above. As to the question whether the application was in substance a request for an "any time" revision, it is clear that the ground on which the claimant was seeking reconsideration was that the law as set out in *MH* and *RJ* had not been applied when the 2017 Decision was made and it affected his claim. That in my view was in substance a request for reconsideration and revision on the ground of official error.

74. The submission then sets out paragraph 13 of the Tribunal's statement of reasons, which I have quoted in paragraph 68 above and comments:

> "Given that the Secretary of State did not issue decision makers with guidance on RJ until 13/11/17, and no advice on MH was issued until June 2018 it seems somewhat unlikely that the principles of those authorities were applied by the decision maker who made the decision of 22/06/17."

I would go further. As I have said in paragraph 11 above, the 2017 Decision was made while the Amendment Regulations reversing the decision in *MH* were apparently in force and while appeals against both *MH* and *RJ* were pending. The whole point of the LEAP review was that in considering the claimant's claim in 2017 the DWP had not applied what the law was declared to be in those decisions. To that extent there was an admitted official error and the claimant was prima facie entitled to apply for an "any time" revision of the 2017 Decision on that ground.

75. As to (3) in paragraph 72 above, in my view *PH* does not decide that an application for an "any time" revision is made if and only if the request advanced an arguable, non-hopeless case in support of the proposition that the "any time" ground is satisfied. In paragraph 12 of the decision Judge Poole simply expresses the view that if the request advances no arguable case and is spurious, the First-tier Tribunal may find that there has been no properly constituted "application to revise". That may be the case if the application is made solely on the basis that there was an official error but contains no indication of any kind, even in the broadest terms, of what the error was. The Secretary of State will then be left without any indication of the issues which fall to be considered as a result of the application and it may be said that it follows that it is impossible to consider the application. I do not need to decide the point, however, because in the present case there can be no doubt what the nature of the error complained of by the claimant was and it is therefore clear that the substance of the application for revision was the "any time" ground of official error. Further, the information which he gave was arguably relevant to his ability to carry

out activities safely and to his mental state and thus was directly related to the errors which he said had occurred.

76. In those circumstances, I have come to the conclusion that the Tribunal erred in law in concluding that it did not have jurisdiction to hear an appeal against the 2017 Decision because the application for revision would have had to have been made within the 13 month absolute time limit imposed by regs. 5 and 6 and in failing to consider the merits of the claimant's appeal against the 2017 Decision, since that appeal followed the decision on his application for revision of the 2017 Decision which in my view was properly made on the ground of official error. Rather, the task of the Tribunal was to consider whether, on the basis of the available material, the DWP had correctly applied *MH* and *RJ* in deciding that the claimant scored 0 points by reference to the PIP descriptors and if not, whether he scored sufficient points to entitle him to an award of either component of PIP.

77. It is to be noted that the circumstances of the present case are different from the situation considered by Judge Wikeley in *GJ* v *Secretary of State for Work and Pensions (PIP)* [2022] UKUT 340 (AAC). In that case, it appears that the application for mandatory reconsideration was an "any ground" application; certainly the appeal itself did not raise any points on *MH* and *RJ* but was based on failure to consider generally how the claimant's disability affected him. It follows that the First-tier Tribunal correctly found that it did not have jurisdiction to hear the appeal because the appeal was out of time. It also appears, however, that the First-tier Tribunal considered for itself whether there was any official error, taking the view that unless it was satisfied that there had been an official error, it did not have jurisdiction. It may have been appropriate for the Tribunal to take that course in the circumstances of the case, since the claimant was evidently not alert to the significance of basing his arguments on official error. In my view, if and in so far as *GJ* decides that, where an application for reconsideration was made on the ground of official error and the appeal is brought on the ground that an official error meant that the decision was wrong, the First-tier Tribunal only has jurisdiction if it is satisfied that there was an official error which caused the decision to be wrong, the decision in *GJ* itself is inconsistent with *PH* and *PH* is to be preferred. The essential question in LEAP cases is whether the original decision was wrong, given that if and to the extent that questions of distress in relation to mobility activity 1 and safety generally arose, the approach taken by the DWP decision maker would have been wrong in law. If there was no reason to apply the law as established by *MH* and *RJ* because the facts did not give rise to such issues, there can have been no relevant official error. If the facts did give rise to such issues, the Secretary of State will have considered a properly constituted application for revision on an "any time" ground and the claimant has a right to appeal against the original decision on the merits of the issues raised by the application for revision. The Tribunal has jurisdiction to hear such an appeal.

78. In the present case, of course, the Tribunal did not proceed on a basis comparable to that in *GJ*, but on the basis that the DWP was aware of the decisions in *MH* and *RJ* and, by inference, applied them. As explained in paragraph 74 above, in that respect the Tribunal was plainly wrong.

79. As Judge Hansen said when granting permission to appeal, the specific failure to consider the matters raised by the claimant in the telephone conversation on 7th July 2021 is related to the general failure to consider the appeal on its merits. The

Secretary of State submits that the Tribunal erred in this respect also. Once it is recognised that the Tribunal had jurisdiction to consider the appeal on its merits, it follows that the matters raised in the telephone conversation fall to be considered, since they may be relevant to the question whether or not the 2017 Decision was correct.

80. I add that the papers before me contain other material which was not available when the 2017 Decision was made but which may shed some light on the claimant's circumstances at the time of that decision. The specific reference to what was said in the telephone conversation is not intended to preclude reference to such other material.

81. Judge Hansen observed when giving permission to appeal that the claimant as described in the 2017 material appears to be a very different person from the claimant as he now describes his condition at that time. I agree that the papers give that impression. I note that much of what the claimant now says seems to relate to a period after the pandemic began and in particular after the first lockdown, those being circumstances which are now recognised to have had substantial effects on the mental health of some people. The First-tier Tribunal noted that he was likely to be vulnerable. The claimant has obtained representation for the purposes of the present appeal and he may well find it helpful, if possible, to remain represented when the matter comes before the new Tribunal.

Conclusion

82. For the reasons given above, I allow the appeal and set aside the decision of the First-tier Tribunal given on 2nd February 2021. I remit the matter for reconsideration by a new tribunal constituted differently from the previous Tribunal.

E. Ovey

Judge of the Upper Tribunal

Signed on the original on 6th April 2023