



*GS v Secretary of State for Work & Pensions*  
[2024] UKUT 4 (AAC)

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2022-001714-UCW**

On appeal from the First-tier Tribunal (Social Security and Child Support)

**Between:**

**GS**

Appellant

- v -

**Secretary of State for Work & Pensions**

Respondent

**Before: Upper Tribunal Judge Mitchell**

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, taken on 13 July 2022 (case ref. SC 154/22/00623), involved an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-tier Tribunal's decision. Under section 12(2)(b)(i) of that Act, the Upper Tribunal remits this case to the First-tier Tribunal for reconsideration in accordance with the following directions:

- (1) The panel of the First-tier Tribunal that redetermines the Appellant's appeal against the Secretary of State's decision must not include any person who was a member of the panel whose decision the Upper Tribunal has set aside.

- (2) The First-tier Tribunal must hold a hearing before redetermining the Appellant's appeal.
- (3) If either party wishes to rely on further written evidence or submissions, they are to be received by the First-tier Tribunal within one month of the date on which this decision is issued.

Apart from direction (1), the above directions may be modified by direction given by the First-tier Tribunal.

*The parties are reminded that the First-tier Tribunal must not take into account circumstances after 14 October 2021, the date of the Secretary of State's decision (section 12(8)(b), Social Security Act 1998). Evidence generated after that date may be taken into account if the First-tier Tribunal considers it relevant to the circumstances at 14 October 2021.*

## REASONS FOR DECISION

### Background

1. The Upper Tribunal's reasons for granting the Appellant permission to appeal against the First-tier Tribunal's decision read as follows:

*"Ground 1*

4. The first ground of appeal advanced by [GS'] representative is that the First-tier Tribunal erred in law because it failed to make findings on his wife's oral evidence, given at the hearing of his appeal.

5. The Tribunal's statement of reasons records that [GS'] wife attended the hearing, but I can find no mention in it of her having given oral evidence. The Tribunal that heard [GS'] appeal was presided over by Judge Harty. [GS'] application to the First-tier Tribunal for permission to appeal to the Upper Tribunal was also decided by Judge Harty, on 1 November 2022. The decision notice recording the judge's reasons for refusing permission included:

(a) a statement that the Tribunal considered all the evidence including the oral evidence given by [GS'] wife at the hearing; and

(b) "the Tribunal concluded that the evidence of [GS] and his wife at the hearing on 13.07.2022, that he needed help with everything, was not a reliable account of how he had been on 14.10.2021".

6. The judge's permission reasons therefore (a) stated that [GS'] wife's oral evidence was taken into account when the Tribunal refused his appeal in July 2022, although that evidence was not mentioned in the Tribunal's statement of reasons, and (b) found that the wife's oral evidence was unreliable, a finding that does not appear in the Tribunal's statement of reasons.

7. I grant permission to appeal on the ground that the Tribunal arguably erred in law by failing to make findings of fact about [GS'] wife's oral evidence. The Tribunal's statement of reasons makes no mention of her oral evidence let alone findings as to whether it was accepted or rejected and, if rejected, why.

8. Even if I assume that the findings described in Judge Harty's permission reasons were the (unexpressed) findings of the panel that decided [GS'] appeal in July 2022, it is arguably doubtful whether they may be relied on in the present appeal before the Upper Tribunal. I say that because the Court of Appeal in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498 held that "in principle a decision maker who gives one set of reasons cannot, when challenged, come up with another set". Since [GS'] wife's oral evidence was not mentioned in the Tribunal's statement of reasons, arguably the reasons subsequently given were impermissible new reasons in that they dealt with a matter that was absent from the Tribunal's statement of reasons.

## *Ground 2*

9. Essentially, the second ground is that the Tribunal made inconsistent findings: [GS] both could and could not cope with the work of a carpet fitter. Paragraph 14 of the Tribunal's reasons includes a finding that [GS'] reported

statement that he worked as a carpet fitter for 5 ½ months in late 2018 / early 2019 was to be taken at face value and his argument that he meant helping a carpet fitter out by doing undemanding tasks like passing a pencil should be rejected. Paragraph 28 of the reasons includes a finding that “[GS] could not safely do hard physical labour, like...carpet fitting”.

10. The Tribunal was dealing with an appeal against a Universal Credit decision taken on 14 October 2021. The evidence before the Tribunal included that [GS] lower back pain became worse in 2021 following administration of a Covid vaccine. The Tribunal’s reasons do not say when in 2021 but, since the section of the statement of reasons which recounts the evidence is set out chronologically, it appears to me that the vaccine preceded the HCP assessment (the next event described) on 30 September 2021.

11. I do not grant permission to appeal on the second ground advanced by [GS]’ representative. The Tribunal’s findings would have been inconsistent had they related to [GS]’ capability at the same point in time. But they did not. One concerned his capability in late 2018 / early 2019 and the other in October 2021, and there was evidence of a deterioration in [GS]’ condition in the intervening period. [GS] does not have a realistic prospect of establishing that the Tribunal erred in law by reason of having made inconsistent findings of fact.”

## **The arguments**

2. The Secretary of State supports this appeal. The Secretary of State’s representative submits that the First-tier Tribunal erred in law as described in the Upper Tribunal’s reasons for granting permission to appeal. The Secretary of State invites the Upper Tribunal to set aside the First-tier Tribunal’s decision and remit this case to the First-tier Tribunal for redetermination. The Appellant’s representative was sent the Secretary of State’s submissions but had no further comment to make. Neither party requests a hearing before the Upper Tribunal decides this appeal.

## **Conclusion**

3. I decide that the First-tier Tribunal’s decision involved an error on a point of law. The Tribunal’s reasons for its decision recorded that the Appellant’s wife attended the hearing but made no mention of her giving evidence. From those reasons, the Appellant could not know whether his wife’s evidence was accepted or rejected and,

if rejected, why. The Tribunal's failure to deal with the Appellant's wife's evidence meant that its decision involved an error on a point of law.

4. In this case, the First-tier Tribunal judge who presided over the hearing of the Appellant's appeal to that tribunal also determined the Appellant's application for permission to appeal to the Upper Tribunal. For this purpose, the judge acted alone. As described above, the judge's reasons for refusing permission included reasons for rejecting the Appellant's wife's evidence given at the hearing before the First-tier Tribunal. Since the reasons given for the Tribunal's dismissal of the appeal made no mention of the wife's evidence, I cannot be certain that the reasons given by the judge at the permission stage were, in fact, the reasons of the panel that dismissed the appeal (the panel consisted of the judge and a medical member). Moreover, the reasons given at the permission stage fall foul of *Bancoult*. They were essentially new reasons that formed no part of the Tribunal's earlier explanation of why it dismissed the Appellant's appeal against the Secretary of State's decision.

5. I set aside the First-tier Tribunal's decision and remit this case to that Tribunal for re-determination by a differently constituted panel, in accordance with the directions given above.

E Mitchell  
**Judge of the Upper Tribunal  
Authorised for issue on 4  
December 2023.**