



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-001137-PIP  
[2024] UKUT 86 (AAC)**

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

**Between:**

**H.S.**

Appellant

- v -

**Secretary of State for Work and Pensions**

Respondent

**Before: Upper Tribunal Judge Wikeley**

Decision date: 21 March 2024

Decided on consideration of the papers

**Representation:**

Appellant: In person

Respondent: Ms Emma Fernandes, Decision Making and Appeals, DWP

## **DECISION**

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal made on 8 August 2022 under number SC322/21/00671 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 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 8 August 2022.**
- 3. The claimant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 31 August 2021).**
- 4. If the Appellant has any further written evidence to put before the tribunal and, in particular, further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (see Direction (3) above).**
- 5. The new Tribunal will be dealing with the closed period from 5 March 2021 to 9 August 2022 (see paragraph 11 below).**
- 6. 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**

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

1. The Appellant's appeal to the Upper Tribunal succeeds and there will need to be a completely fresh hearing of the original PIP appeal before a new First-tier Tribunal (FTT).

### **The moral of this case**

2. The wider lesson of this case is that FTT panels need to ensure that they have sight of all the relevant documentation in the case.

### **The Upper Tribunal's decision in summary and what happens next**

3. I allow the Appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision.
4. The case now needs to be reheard by a new and different First-tier Tribunal. 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.

### **The background to this appeal to the Upper Tribunal**

5. The Appellant made a claim for PIP on 5 March 2021. One of the Secretary of State's decision-makers refused that claim on 31 August 2021, scoring the Appellant at nil points for both components. The FTT dismissed the Appellant's appeal. In short, the FTT placed more weight on what the Appellant said in her claim form and the record of the HCP assessment than on the Appellant's later submissions. It considered the Appellant had 'overstated' the impact of her health conditions.

### **The proceedings before the Upper Tribunal**

6. I gave the Appellant limited permission to appeal, commenting as follows:

#### **"Grounds of appeal**

3. The Appellant relies on the grounds in her request to the FTT for permission to appeal. The Appellant responds to the FTT findings by suggesting why she might have answered some questions in a way that contradicts other evidence. She also says the Tribunal did not ask the questions that would have enabled her to describe what was difficult, e.g. not asking her how she would feel after she had been on a journey. The Appellant also asserts that the Tribunal did not apply regulations 4 and 7 properly. She says they could not reach the conclusions that they did on the evidence that she provided. District Tribunal Judge Chrimes covers and deals with these various grounds in his refusal of permission to appeal on behalf of the FTT and I adopt and endorse his analysis. These grounds are an attempt to re-argue the merits of the appeal.

4. However, this is an inquisitorial jurisdiction and I have considered whether the appeal may be arguable on any other basis.

**Documents and the procedural history in the First-tier Tribunal**

5. The FTT bundle now contains 930 pages – the DWP submission, 119 numbered pages and Additions A-Z22. The statement of reasons (SOR) says the FTT considered 422 pages. If so, this would mean the FTT only had the papers up to and including Addition Z2. There were also two adjournments and one postponement. The SOR only refers to the first adjournment.

6. The Appellant had asked for a decision on the papers (p.6 hard copy/28 electronic). On 13/05/22 the appeal was adjourned for an oral hearing as the FTT felt oral evidence was required and the directions included an invitation to provide medical records (Addition L). The hearing was adjourned again on 23/06/22 as the panel had not been made aware of the additional 446 pages uploaded to Judicial Case Manager system (JCM) but not added to the bundle. Those directions have been added as Addition Z16 (p.887). The extra material is Z3-Z14.

7. A hearing listed for 21/07/22 was postponed as the panel included someone who was excluded. Addition Z17 is then the FTT decision of 08/08/22 now under challenge.

8. If the FTT only considered the bundle to p.422, then it did necessarily did not consider the additional material after Z2 either. (Anecdotally the bundle does not get restitched after an adjournment, so the Tribunal would have to go to the documents tab in JCM and work from the individual documents). However, that said there is a lot of duplication in the extra 446 pages. The Appellant says at Z3 that she identifies the new material as her personal statement, heart rate data, symptom diaries and medical notes from 2020-2022. However, that mostly does not appear to be new; rather, the Appellant seems to have submitted everything again from Addition N onwards.

**Discussion**

9. Does this matter? Arguably it might. It looks like the only document that had not already been added is the 263 pages of medical records (Additions Z8-Z11). In her application for permission to appeal the Appellant refers to Addition Z8 (pp.19-23 and 44) Z10 re driving (and Z9 (pp.39 and 55) re asthma), all being pages from her medical records. As to driving, the Appellant highlights these entries (her grounds at [5]):

Addition Z8|Page 20 GP notes entered on 16/04/2021 state that “Email from patient chasing an earlier request for a letter advised not to drive by Dr. [name redacted].

Addition Z8|Page 19 GP notes entered on 23/04/2021 state that “does not need letter re driving (advised not to drive by Neurologist) – chat re whether to inform insurance company”.

Addition Z8|Page 23 GP notes entered on 12/02/2021 state “and avoid driving/cycling”.

Addition Z10|Page 21 A letter from Dr. [name redacted] to Dr. [name redacted] dated 20/03/2021 states that “In the meantime, of course, I have advised that she should not drive”

Addition Z9|Page 44 A letter from Dr. [name redacted] dated 13/09/2021 states that “Given your EEG result is reassuring I am happy for you to resume driving”.

10. For the reasons identified above, it may be questionable whether the Tribunal saw the documents at Z3 onwards. That being so, the Appellant’s best point is perhaps the question of how the Tribunal assessed her credibility. All the documents were on JCM, even if they had to be opened as individual documents. The only way the Tribunal would not have seen them would have been if they were sent paper files instead of working from digital files. They did not believe that she was not driving for as long as she says. The FTT rely on the 18/10/20 letter that clears the Appellant to drive again. They do not seem to refer to the Z8 references to a further period when she was told not to drive. Of course, it might have made no difference. Driving is not the only reason for not awarding planning and following points for mobility activity 1. The Tribunal was satisfied the Appellant did not experience overwhelming psychological distress and there was evidence of her ability to carry out journeys by public transport. The FTT are also entitled to place more weight on the claim form and what was said at the assessment. The FTT has explained why they did this. However, the general finding was that the Appellant had ‘overstated’ her claim. Is there a possibility that, had they seen the Z8 evidence that supported what the Appellant said about not driving in 2021, then they might have reached a different conclusion about her credibility?

## **Conclusion**

11. For the most part the grounds of appeal amount to an attempt to re-argue the case on its factual merits, or on the weight to be attached to particular items of evidence. To that extent I refuse permission on most of the grounds. However, I grant limited permission to appeal on para [5] of the grounds as developed in paras 5-10 above.”

7. Ms Emma Fernandes, the Secretary of State’s representative in these proceedings, supports the appeal and helpfully consents to the FTT’s decision being set aside. She accepts it is arguable that the FTT did not consider the additional evidence at Additions Z8-Z11. She continues:

“13. To begin with, there isn’t an issue of the FTT not having all the evidence, the issue is that it was fragmented and was partly on the JCM system, so did the Tribunal FTT actually consider it all? I submit that it is not clear that the Tribunal did consider all of it. The Tribunal noted that the claimant claimed she had not driven for over year on the advice of her

neurologist and that she was not driving at the date of decision (31/08/21), which they found to be inconsistent. However, as pointed out by the UT Judge, the medical evidence illustrated in several places that the claimant had been advised not to drive.

14. Further to this, based on the UT Judge's discussion in his permission to appeal grant, a key question is whether the FTT correctly assessed the claimant's credibility as the general finding was that she had 'overstated' her claim, but is there a possibility that, had they seen the Z8 evidence that supported what she said about not driving in 2021, then they might have reached a different conclusion about her credibility?

15. Firstly, Tribunals are entitled to make their own judgement on credibility and it is not for the UT to disturb such findings as per *IP v Secretary of State for Work and Pensions (IB)* [2010] UKUT 97 (AAC)

*"12 - I also accept that the tribunal in this case made a very strong finding of credibility, or rather lack of credibility, on the part of the appellant. I acknowledge that findings of credibility are pre-eminently a matter for the First-tier Tribunal, which has the advantage of reviewing the evidence at first hand. The tribunal also, of course, includes a medical member.*

*13 - I bear in mind the warning of Leveson LJ in the Court of Appeal's judgment in Secretary of State for Work and Pensions v Roach [2006] EWCA Civ 1746 (at paragraph 37) that a Social Security Commissioner (now an Upper Tribunal Judge) should not seek to disturb a tribunal's findings of fact by way of "an attempt to reanalyse evidence (which he had not heard) from a perspective that he preferred." **It follows that the Upper Tribunal should tread very warily before disturbing a finding of credibility, whether that is in favour or contrary to the interests of a claimant, and can only do so if there is an error of law.** However, the First-tier Tribunal is also under an obligation to give adequate reasons for its decision." (my emphasis)*

16. That being said, I submit that the Tribunal have erred in law by failing to consider all the evidence available to them, particularly that from pages Z8 onwards. As such, as the above case points out, a finding of credibility can be disturbed only if there has been an error of law and I submit the Tribunal may have made a different conclusion on her credibility had they been aware of the evidence (at Additions Z8-Z11) as this would have cast doubt on her 'overstating' her claim.

17. Also, had the Tribunal reached a more positive finding on her credibility, it's possible this may have led to further points being awarded. Ultimately, the Tribunal ought to have adequately explained **what** evidence they considered and as the SOR stated they considered just 422 pages and they failed to award points in relation to driving, I submit that the Tribunal erred

in law by failing to consider evidence before it, as they ought to do as per section 12(8)(b) of the Social Security Act 1998.”

8. I am satisfied that the First-tier Tribunal erred in law for the reasons set out above. I therefore allow the Appellant’s appeal to the Upper Tribunal, set aside (or cancel) the Tribunal’s decision and remit (or send back) the original appeal for re-hearing to a new tribunal, which must make a fresh decision.

#### **What happens next: the new First-tier Tribunal**

9. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. 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 claimant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.
10. In doing so, however, unfortunately the new Tribunal will have to focus on the claimant’s circumstances as they were as long ago as in August 2021, and not the position as at the date of the new hearing, which will obviously and regrettably be nearly 3 years later. This is because the new Tribunal 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 31 August 2021.
11. The new Tribunal will also note it is now dealing with the case as covering a closed period. This is because the Appellant made a successful claim for PIP just two days after her appeal was dismissed by the FTT in August 2022, being awarded the standard rate of both the daily living and the mobility components of PIP from 10 August 2022 to 31 May 2024. On the new claim the Appellant was found to satisfy daily living descriptors 1b, 4b, 5b and 6b (8 points) and mobility descriptor 2d (10 points). It follows that the new Tribunal hearing the remitted appeal will be dealing with the closed period from 5 March 2021 to 9 August 2022.

#### **Conclusion**

12. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Nicholas Wikeley  
Judge of the Upper Tribunal**

Authorised for issue on 21 March 2024