IN THE UPPER TRIBUNAL **Appeal No.** CPIP/506/2020
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

DO

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 2 July 2021
Decided after an oral hearing on 7 May 2021

Representation:
Appellant: Martin Williams, Child Poverty Action Group.
Respondent: Yasser Vanderman of counsel.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 17 August 2019 under case number SC242/19/04034 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set the tribunal's decision aside and remake that decision. In remaking the decision I set aside the Secretary of State's decision of 27 December 2018 and replace it with a decision that the appellant is entitled to the enhanced rate of the daily living component and the standard rate of the mobility component of Personal Independence Payment from 6 September 2018.

REASONS FOR DECISION

Introduction

1. The issue of wider significance which arises on this appeal concerns the effect of the Secretary of State considering that her decision under appeal is no longer correct, but she has then not revised that decision, on the First-tier Tribunal's approach to the appeal against the decision as not revised.

Relevant legislation

2. In order to better frame the background facts and discussion of the legal issues set out below, it is I think helpful to first set out the relevant legislation.

3. Section 8(1)(a) of the Social Security Act 1998 ("SSA 1998") provides, so far as is material that, "it shall be for the Secretary of State to decide any claim for a relevant benefit". That provision applies to claims for the Personal Independence Payment "(PIP").

4. PIP is governed by Part IV of the Welfare Reform Act 2012. By section 77 of that Act a person may be entitled to the daily living component or mobility component of PIP or both components. Entitlement to either component is at a standard or enhanced rate. The detailed basis for assessing entitlement to PIP is laid out in the Social Security (Personal Independence Payment) regulations 2013 ("the PIP Regs"). I do not need to refer to any of that detail for the purposes of this appeal.

5. Returning to the SSA 1998, a decision on a claim made under section 8 of the SSA 1998 may be challenged in a number of different ways. Section 9 of the SSA 1998 provides for revision of decisions. Section 9 sets out, so far as is relevant to this appeal, the following.

> "**9.**—(1) Any decision of the Secretary of State under section 8 above or section 10 below 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 as 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) Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under this section before the appeal is determined."

6. Section 10 of the SSA 1998, which concerns supersession of decisions, need not be set out as it does not arise on this appeal.

7. A decision made by the Secretary of State under section 8 may also be challenged by a 'full merits' appeal to the First-tier Tribunal under section 12 of the SSA 1998. The relevant parts of section 12 are as follows.

> "**12.**—(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which–
> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; [or]
> (b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act;….
> (2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal, but nothing in this subsection shall confer a right of appeal in relation to–
> (a) a prescribed decision, or a prescribed determination embodied in or necessary to a decision, or
> (b) where regulations under subsection (3A) so provide.
> (3) Regulations under subsection (2) above shall not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required.
> (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) The regulations may in particular provide that that condition is met only where–
> (a) the consideration by the Secretary of State was on an application,
> (b) the Secretary of State considered issues of a specified description, or
> (c) the consideration by the Secretary of State satisfied any other condition specified in the regulations…..
> (6) A person with a right of appeal under this section shall be given such notice of a decision to which this section applies and of that right as may be prescribed.
> (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."

The provisions in section 12(3A) concern what is described as 'mandatory reconsideration'

8. Regulations 7, 11 and 52 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance Regulations 2013 ("the DMA Regs 2013") also need to be considered. These set out the relevant detail concerning revising a decision under appeal.

9. Regulation 7 of the DMA Regs 2013 is made under section 12(3A) of the SSA 1998 and provides that:

> "7.—(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) that 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.
> (3) The notice referred to in paragraph (1) must inform the person—
> (a) of the time limit under regulation 5(1) (revision on any grounds) for making an application for a revision; and
> (b) that, where the notice does not include a statement of the reasons for the decision ("written reasons"), the person may, within one month of the date of notification of the decision, request that the Secretary of State provide written reasons.
> (4) Where written reasons are requested under paragraph (3)(b), the Secretary of State must provide that statement within 14 days of receipt of the request or as soon as practicable afterwards.
> (5) Where, as the result of paragraph (2), there is no right of appeal against a decision, the Secretary of State may treat any purported appeal as an application for a revision under section 9 of the 1998 Act."

10. Regulation 11(1) of the same regulations provides that:

> "11.—(1) A decision may be revised where there is an appeal against the decision within the time prescribed by the Tribunal Procedure Rules but the appeal has not been decided."

11. The last material provision in the DMA Regs 2013 is regulation 52. It is concerned with what happens to the appeal where the decision under appeal has been revised and the circumstances in which the appeal does not lapse. Regulation 52 is made pursuant to section 9(6) of the SSA 1998 and sets out the following.

> "52.—(1) An appeal against a decision of the Secretary of State does not lapse where—
>
> (a) the decision is revised under section 9 of the 1998 Act before the appeal is decided; and
>
> (b) the decision of the Secretary of State as revised is not more advantageous to the appellant than the decision before it was revised.

(2) In a case to which paragraph (1) applies, the appeal must be treated as though it had been brought against the decision as revised.

(3) The Secretary of State must inform the appellant that they may, within one month of the date of notification of the decision as revised, make further representations as to the appeal.

(4) After the end of that period, or within that period if the appellant consents in writing, the appeal to the First-tier Tribunal must proceed, except where—

(a) the Secretary of State further revises the decision in light of further representations from the appellant; and

(b) that decision is more advantageous to the appellant than the decision before it was revised.

(5) Decisions which are more advantageous for the purpose of this regulation include those where—

(a) the amount of any benefit payable to the appellant is greater, or any benefit is awarded for a longer period, as a result of the decision;

(b) the decision would have resulted in the amount of benefit in payment being greater but for the operation of any provision of the Administration Act or the Contributions and Benefits Act restricting or suspending the payment of, or disqualifying a claimant from receiving, some or all of the benefit;

(c) as a result of the decision, a denial or disqualification for the receipt of any benefit is lifted, wholly or in part;

(d) the decision reverses a decision to pay benefit to a third party instead of to the appellant;

(e) in consequence of the decision, benefit paid is not recoverable under section 71ZB, 71ZG or 71ZH of the Administration Act or regulations made under any of those sections, or the amount so recoverable is reduced; or

(f) a financial gain accrued or will accrue to the appellant in consequence of the decision."

12. The last piece of relevant law is rule 24 of the Tribunal Procedure (First-tier Tribunal (Social Entitlement Chambers) Rules 2008. This rule governs the provision and content of the respondent's (here the Secretary of State's) written appeal response to an appeal. So far as is relevant to this appeal, the rule requires the following:

"24.-(2) The response must state….

(e) whether the decision maker opposes the appellant's case and, if so, any grounds for such opposition which are not set out in any documents which are before the Tribunal….

(4) The decision maker must provide with the response—

(a) a copy of any written record of the decision under challenge, and any statement of reasons for that decision, if they were not sent with the notice of appeal; [and]

(b) copies of all documents relevant to the case in the decision maker's possession….."

Relevant factual background

13. The appellant made a claim for PIP by telephone in September 2018. The decision on that claim was made on 27 December 2018 and awarded the appellant the standard rate of the daily living component of PIP, but no award of the mobility component, from 6 September 2018 to 5 June 2021. The award of the standard rate of the daily living component of PIP was based, broadly speaking, on the appellant needing prompting from another person in relation to the following activities: preparing food, washing or bathing, dressing or undressing and engaging socially with other people.

14. The Secretary of State's written appeal response to the First-tier Tribunal describes the appellant's representative as making a request for 'mandatory reconsideration' by telephone on 17 January 2019. Nothing would seem to turn on this on this appeal and no transcript of the telephone call has been made available. It must be assumed that that request was for a revision of the 27 December 2018 decision as the necessary prior step to bringing an appeal against that decision.

15. The chronological order of the papers put before the First-tier Tribunal by the Secretary of State with her appeal response shows that evidence was then received by the relevant DWP office from or on behalf of the appellant on 5 February 2019. This was in the form of a printout from the appellant's GP records from on or after 9 January 2019 and a three page letter from an Autism Adviser at the Barnet Mencap and Barnet NHS Autism Service. It would seem that this letter had been written in connection with the mandatory reconsideration challenge to the 27 December 2018 decision on the PIP claim. The letter raised issues about the appellant's difficulties with communication and social interaction. It appears that this further evidence may have led the Secretary of State's decision maker to seek further advice from a health care professional. In any event, such advice was sought. The advice was sought about daily living activities 2 (taking nutrition), 3 (managing therapy), and 10 (making budgeting decisions), and mobility activity 1 (planning and following journeys): per Schedule 1 to the PIP Regs. The advice given by the health care professional, on 11 March 2019, suggested that additional points were merited under the daily living component of PIP for needing prompting to manage medication (descriptor 3b) and needing prompting to be able to make complex budgeting decisions (descriptor 10b), but no additional points were suggested for either of the mobility activities. This advice was accepted by the decision maker. The result was, as set out in a 'DWP' letter to the appellant of 22 March 2019, that the daily living points increased to eleven, but this did not mean any higher award of PIP (twelve points being needed for the higher 'enhanced' rate of the daily living component). Effectively, this was a decision refusing to revise the 27 December 2018 decision. It was described in the "Schedule of events" in the Secretary of State's appeal response to the First-tier Tribunal as the 'mandatory reconsideration decision'.

16. On 17 April 2019 the appellant brought an appeal against the 27 December 2018 decision as not revised. He was in time in bringing that appeal as the appeal was made within one month of the mandatory reconsideration decision: per rule

22(2)(d)(i) of the Tribunal Procedure (First-tier Tribunal (Social Entitlement Chambers) Rules 2008. The detailed grounds of appeal challenged the failure to award the appellant any points for daily living activities 5 and 7 (manging toilet needs and communicating verbally), too few points for daily living activity 9 (engaging with other people face to face), and no points under either of the mobility activities. The Secretary of State was notified by the First-tier Tribunal of the appeal on 23 April 2019 and instructed to file her appeal response within 28 days.

17. What then occurred is explained in the Secretary of State's appeal response. It sets out – in a box titled "Facts", though the box is only concerned with facts concerning the steps taken under the mandatory reconsideration process and about offering to revise the decision under appeal if the appeal was to be withdrawn – that a decision maker "contacted the Appellant by telephone [on 20 May 2019] to explain how their decision could be changed but was unable to get hold of the appellant". A further 'fact' was that "on 28 May 2019 the decision maker had contacted the Appellant by letter to explain how their decision could be changed but he asked for the appeal to continue". That letter is important and was rightly included by the Secretary of State with her appeal response as a document that was relevant to the case: see rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal (Social Entitlement Chambers) Rules 2008. The letter is in fact dated 20 May 2019.

18. The 20 May 2019 letter says it is about 'Personal Independence Payment' and has as the sub-heading: "About your appeal - we can change your award". It continues:

> "We need some more information before we can progress your claim for Personal Independence Payment.
>
> You appealed against your PIP decision we made on **27/12/2018**. Since we made this decision we have looked at your claim again along with all the evidence and decided we can change your decision.
>
> We can award you Enhanced Rate Daily Living and Standard Rate Mobility from **06/09/2018**. [The rates of those components of PIP from April 2019 are then set out]
>
> **What we want you to do**
>
> Please call us to tell us you agree with our decision. The Phone number is on the front page of this letter. We will then change your PIP award and your appeal will stop. Please call us by **03/06/2019**.
>
> [The letter then suggests ways in which the appellant could obtain advice]."

19. A number of observations are merited about this letter. First, it was agreed before me that "We need some more information" simply related to the appellant saying whether he agreed with the proposed new decision. Second, the letter communicates that the Secretary of State had decided, albeit in some informal form of adjudication stopping short of actually revising the decision under appeal, that the correct awarding decision to be made on appellant's claim for PIP was that he was entitled to the enhanced rate of the daily living component and the standard rate of the mobility component of PIP. As was accepted by the Secretary of State before me, whatever route the decision under appeal may have come to be changed, the Secretary of State by this letter was accepting that her decision under appeal was no longer correct. Third, although the letter in effect told the appellant that if the decision under appeal was revised (by him 'agreeing' to the new decision) the appeal would then lapse (per section 9(6) of the SSA 1998 – though this would be a matter for the First-tier Tribunal to determine where necessary), it failed to inform the appellant that he would have a right of appeal against the new decision. I shall return to this omission later.

20. The next page in the appeal bundle is a letter from the appellant dated 24 May 2019 to the PIP DWP office. This was understood by Secretary of State as meaning the appellant did not agree with the decision being changed as proposed in the 20 May 2019 letter. What the appellant's letter in fact said was:

> "I wish to have an oral hearing so that I can explain the full effects of my condition to the tribunal and answer any questions that they wish to ask.
>
> Furthermore, I do not consider that the decision maker took full account of my condition and the way if affects my everyday activities and bodily functions."

21. The Secretary of State's view that her decision of 27 December 2018 no longer remained the correct decision was also set out in the body of her written appeal response to the First-tier Tribunal, although not as clearly as it might have been. Section 4 of the written appeal response, titled '**Issues raised by the appeal**', addressed the activities specified in the appeal. At the end of the part of this section dealing with '**Planning and following journeys**' the appeal response ended by saying "In keeping with the nature and history of [the appellant's] conditions, findings and observations at the assessment and level of prescribed treatment, I submit [the appellant] could carry out this activity safely with the use of assistance and therefore I respectfully request the tribunal to consider descriptor D (cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aids) for this activity". Mobility descriptor 1d in Schedule 1 to the PIP Regs carries with it an award of ten points and thus would satisfy an award of the mobility component at the standard rate, consistent with the award the Secretary of State had said should be the correct award in her 28 May 2019 letter. In a further part of the appeal response, titled '**Other points of dispute**', the following was stated:

> "[The appellant] has not disputed activity 2 of taking Nutrition in his appeal. In keeping with the nature and history of [the appellant's] conditions, findings and observations at the assessment and level of prescribed treatment, I submit [the

> appellant] could carry out this activity safely with the use of prompting and therefore I respectfully request the tribunal to consider descriptor D (prompting from another person to eat and drink) for this activity."

This meant the Secretary of State considered that a further four daily living points should be awarded. Added to the eleven points she was satisfied the appellant merited in the mandatory reconsideration decision of 22 March 2019, this meant the Secretary of State had concluded that the appellant ought to be entitled to the enhanced rate of the daily living component of PIP from 6 September 2018, but had not revised the decision under appeal to this effect.

22. The '**Conclusion**' of the Secretary of State's decision maker in her appeal response read as follows.

> "The appellant is advised the Tribunal has the power to increase or decrease the rate or period of the award. The Tribunal may consider all aspects of the benefit, not just the descriptors under appeal. As such, the Tribunal can consider which descriptor applies for each activity and any changes may then increase, reduce or maintain the award.
>
> I've considered all the available evidence and considered which descriptors apply for each activity, taking into account [the appellant's] functional ability. This includes the activities [the appellant] has disputed and those which he hasn't.
>
> I ask the Tribunal to confirm the Secretary of State's decision on 9 Daily Living Activities and 1 Mobility Activity but support changing 1 Daily Living Activity and 1 Mobility Activity: Activities 2 – Taking Nutrition and 11 [Mobility Activity 1] – Planning and Following a Journey and recommendations have been provided in Section 3 above."

23. Two features of this 'Conclusion' require comment. First, and less importantly, the 'recommendations' appeared in Section 4; 'Section 3' simply describes the decision under appeal. Second, and more importantly, the closing paragraph contains a positive request by the Secretary of State to the First-tier Tribunal for that tribunal to change the decision under appeal to one awarding the appellant the enhanced rate of the daily living component and the standard rate of the mobility component. This in my judgment re-emphasised that the Secretary of State no longer considered her decision under the appeal to be the correct decision. It showed, moreover, that the Secretary of State was no longer seeking to uphold the decision which was under appeal to the First-tier Tribunal. Although she had not revised the decision under appeal, for the policy reasons to which I will come, in effect the dispute between the parties on the appeal now had as its starting point that the appellant, on the Secretary of State's considered view, should be entitled to the enhanced rate of the daily living component of PIP and the standard rate of the mobility component of PIP.

24. The appeal was heard by the First-tier Tribunal on 17 August 2019 ("the tribunal"). The appellant attended the hearing of his appeal on his own. No representative of the Secretary of State attended the hearing. The tribunal allowed the appeal, set aside the Secretary of State's decision of 27 December 2018 and substituted a decision that the appellant was entitled to the enhanced rate of the daily living component of PIP from 6 September 2018 to 5 June 2022. It found that no award of the mobility component of PIP was merited. It therefore made a *lesser* award than the award the Secretary of State considered should be made; albeit it was a greater award than the one made by the Secretary of State under her decision of 27 December 2018 (but which she no longer considered was the correct decision).

25. It does not appear that the tribunal satisfied itself that the appellant did not 'agree' with the Secretary of State's proposed decision as set out in the 20 May 2019 letter and wanted his appeal to continue against the less favourable 27 December 2018 decision.

26. Nor did the tribunal really grapple with the consequences of the Secretary of State no longer supporting the decision under appeal in its reasons for its decision. It noted (in paragraphs 8 and 9 of its reasons) "that on 20th May the respondent wrote to the appellant and advised that they had decided that they could change his decision and award him enhanced rate daily living and standard rate mobility. They advised the appellant to contact them to let them know whether he agreed with this decision. The appellant replied on 24th May 2019 and stated that he wished to have an oral hearing so that he could explain the full effect of his condition". The tribunal then turned to the issues arising on the appeal. It failed to note that the Secretary of State had raised in her appeal response the issue of the appellant satisfying descriptor 2d (needing prompting to take nutrition). That failure, however, is not material to the tribunal's decision as, for other reasons, it awarded the appellant the enhanced rate of the daily living component of PIP.

27. The tribunal did recognise that, amongst other issues, the appellant in his appeal had raised the issue of whether he satisfied any scoring descriptors under mobility activity 1. It heard evidence from him on this issue but decided he did not meet any descriptors under this activity. Its reasoning under the heading '**Planning and Following Journeys**" did not, however, address the fact that the Secretary of State was of the view that the appellant did meet mobility descriptor 1d. The tribunal did touch on this in its summation, under "**Conclusion**", where it said the following (at paragraph 45 of its reasons):

> "The tribunal reached this decision based on all the evidence available. The tribunal noted that the respondent had offered the appellant enhanced rate daily living and standard rate mobility on 20th May 2019. The tribunal was unable to determine the basis for the mobility award that had been offered. The submissions of the respondent at page H [quoted in paragraph [21] above] suggest that the appellant would be able to carry out the activity of planning and following with the use of assistance. The tribunal based its decision on all the evidence before it, particularly appellant's oral evidence which was consistent with medical information available. The Tribunal concluded that the appellant was not entitled to a mobility award."

28. I have some difficulty with the use of the word 'offer' here. To an extent it may appropriately describe the transactional nature of what was communicated by the Secretary of State in her 20 May 2019 letter, and the consequence of the appellant not 'agreeing' to the decision the Secretary of State considered should be made was that the appeal continued and the new decision was not made. However, the Secretary of State's function is to determine the correct level of entitlement to benefit: see *Gillies v SSWP* [2006] UKHL 2; [2006] 1 WLR 781; *R(DLA)5/06* at para. [41]. To that extent, the correct level of entitlement is not dependent on a party accepting an 'offered' level of benefit[1]. Perhaps more importantly, the tribunal's use of the language of 'offer' may indicate a lack of understanding on its part about the importance of the letter in showing that the Secretary of State no longer considered that the decision of hers which was under appeal was correct. I also note that the tribunal's reasoning fails to address the Secretary of State's request as set out in the third paragraph quoted in paragraph 22 above.

29. The appellant sought permission to appeal against the tribunal's decision with the assistance of CPAG's Upper Tribunal Project. Permission was sought on three grounds. The First-tier Tribunal gave the appellant permission appeal on all grounds.

30. The first ground was that the tribunal had erred in law in how it dealt with the Secretary of State's 'offer'. It was contended under this ground that the tribunal had erred in law in failing to consider whether to warn the appellant that it could make a worse award than the one 'offered' to him in the 20 May 2019 letter. Fairness ought to have led it to give such a warning. In relation to this first ground of appeal it was further argued that the tribunal ought to have taken into account what was said to be the unlawfulness of the Secretary of State in not revising the decision under appeal. Reliance was placed on paragraph [39] of *R(IS)15/04* as showing that the Secretary of State was required to revise the decision under appeal once she was satisfied (as she was here) that the decision under appeal was not correct.

31. The second ground of appeal concerned the adequacy of the tribunal's reasons for finding that the appellant did not satisfy mobility descript 1d. It was argued that the tribunal's reasons were deficient in that they did not deal with the substance of why the Secretary of State in that appeal response considered that mobility descriptor 1d was satisfied. That consideration had included reference by the Secretary of State in her appeal response to evidence in the appeal bundle showing the difficulties the appellant had in getting out of the house, which had led the Secretary of State to conclude that the appellant needed assistance to follow unfamiliar journeys outdoors. It was argued that neither the tribunal's reasoning quoted in paragraph 27 above nor its more general reasoning adequately addressed either the basis for the Secretary of State's changed view that mobility descriptor 1d was met or adequately explained why the appellant was able to follow unfamiliar journeys on his own.

[1] See separately *KMN v SSWP* (PIP) [2019] UKUT 42 (AAC) for the difficulties that can arise where the First-tier Tribunal makes an 'offer'.

32. The third ground of appeal was that the tribunal failed to have any adequate regard to the *Practice Direction – First-tier and Upper Tribunal – Child, Vulnerable and Sensitive Witnesses*. Reliance was placed under this ground on the appellant's autism and *RT v SSWP* (PIP) [2019] UKUT 207 (AAC). It was argued that the appellant's case was indistinguishable from *RT* and that had the tribunal had regard to the Practice Direction "it may have adjusted procedures such that [the appellant] was better able to give evidence or at least to understand and develop the case made for him by the SSWP".

33. The appeal was then lodged with the Upper Tribunal. It is instructive to set out two pieces of background information that CPAG filed with the appeal to the Upper Tribunal on behalf of the appellant. The first was an answer given by the Minister of State for the Department of Work and Pensions on 9 March 2020 about 'offers' being made by the DWP in the course of PIP appeals to the First-tier Tribunal. The Minister, Justin Tomlinson, said the following.

> "The Department does not make 'offers' to claimants. If at the appeal stage of the decision making process it is decided that a decision can be changed in the claimant's favour, then in law the Secretary of State has the option to revise the decision and thereby lapse the appeal against that decision. As we always aim to make the right decision as early as possible, then changing the decision to award a higher rate of benefit is the right thing to do. However, we will only do this if the claimant agrees. The telephone call is made to explain the changed circumstance. But, critically, it is also the case that, whilst the appeal against the original decision will stop, a new right of appeal is given against the revised decision. This is explained both by the new decision notice and by the letter sent by the Tribunals Service confirming the appeal has stopped. The process does not disadvantage claimants. And, of course, if the second appeal is successful the additional benefit will be backdated and full arrears paid."

34. The second piece of information was an extract from paragraphs A5160 and A5161 of the DWP's *Advice for Decision Makers*. This said the following.

> "A5160 The purpose of lapsing an appeal is to prevent unnecessary appeals going ahead. The power to revise is discretionary rather than mandatory, and should not be used in order to prevent an appeal being heard. DMs are therefore advised to consider whether a decision under appeal should be revised where
>
> 1. The revision does not address the issue which is the subject of the appeal, and
> 2. It is likely that a further appeal will be made.
>
> **Note**: Once the DM actually makes that revised decision then the appeal must lapse so it is important that the DM considers whether revision is the appropriate course of action to take.
>
> A5161 So where a revision would not give the claimant all they are asking for in an appeal, the DM will contact the claimant before revising to ask them if they would still want to appeal if the revised decision were made. If the claimant says they would[:]

1. still appeal, then the decision would not be revised and the appeal goes ahead with our response including details of the revised decision and that we cannot revise the decision as this would mean the appeal would have to lapse[,] or
2. be happy with the decision, the DM would make that revised decision and lapse the appeal. The claimant would be informed of their appeal rights against the revised decision."

35. Ignoring for present purposes whether revision is mandatory or discretionary, and further setting to one side the view that it is the Secretary of State's decision maker who lapses the appeal, two conclusions may be drawn from these two pieces information. First, it is expected that appellants will be told in the course of the 'revision discussion' of their right to bring a fresh appeal against the decision if it is revised. On the face of it, that did not occur here. All the appellant was told in the letter of 20 May 2019 was that if he agreed with the proposed revised decision his appeal would stop. Second, the intent of the Secretary of State is only to leave before the First-tier Tribunal under the (existing) appeal issues that go beyond the level of entitlement she is satisfied should be awarded in the proposed revision decision.

36. I commented in giving directions on the appeal that the Secretary of State's approach not to revise the decision under appeal "may arguably have the curious result of leaving the Secretary of State responding to an appeal against a decision that she no longer considered to be correct".

37. In written submissions filed by the Secretary of State's representative on 17 June 2020, the Secretary of State supported the appeal on all three grounds. However, her support for the first ground of appeal was limited and did not extend across all bases on which the first ground was brought. It was argued that the curious result I had suggested, whilst it was correct, "has come about because the claimant has put the Secretary of State in that position by requesting the appeal proceeds". It may be commented, however, that had the appellant also been told that he could appeal against the decision once it was revised then he may not have wanted to continue with his appeal against the 27 December 2018 decision.

38. The extent of the Secretary of State's support for ground one was:

> "Where the Secretary of State proposed an increased award but did not put it into effect by way of revision because the claimant wanted his or her appeal to continue, it seems to me that this is relevant to the Tribunal. It means that the Secretary of State has adopted a new view of the claimant's entitlement. This position must be based on some combination of (i) new evidence; (iii) a different analysis of the old evidence; or (iii) a different interpretation of the law. As a matter of fairness to both parties to the proceedings, I submit that it is incumbent upon the Tribunal to establish the basis of the Secretary of State's altered stance, and then make findings on its merits. If the Tribunal has not established why the Secretary of State has shifted position, I think it can be said that this omission is an error of law. A Tribunal cannot simply ignore the evidence that the analysis expressed in the Secretary of State's initial response to an appeal no longer represents her view."

39. I do not need to say anything more about the other two grounds of appeal as both parties consider the tribunal erred in law on both those other grounds and I agree with them in that respect. This decision is concerned with the extent to which the tribunal erred in law under the first ground of appeal.

40. Before turning to further discuss the first ground of appeal, I should record that on 12 April 2021 I refused to stay deciding this appeal behind the judicial review proceedings in the High Court in *R(K) v SSWP* (CO/4263/2020) in which the lawfulness of the Secretary of State's policy not to revise decision under appeal is being challenged. That judicial review is due to be heard later this month.

Discussion and Conclusion

41. I consider that the tribunal erred in law in its approach to the Secretary of State's proposed revision decision and the effect that proposed decision had on the issues that arose on the appeal before the tribunal. The error of law here extends beyond the Secretary of State's view that, as a matter of fairness, it was incumbent on the tribunal to establish the basis of the Secretary of State's altered stance and then make findings on its merits. The problem, in my judgment, with this analysis is that it relegates the Secretary of State's altered stance merely to an evidential consideration for the First-tier Tribunal to address and fails to recognise the status of the Secretary of State's statutory role in the social security adjudicatory machinery. It also fails to recognised the effect which the Secretary of State's stance had in reality on the decision under appeal to the tribunal and/or on the issues that arose on the appeal from that decision.

42. I have already commented on a number of aspects of the evidence that are relevant to the first ground of appeal. In summary, this evidence shows that the Secretary of State had concluded prior to the appeal hearing and as part of her preparation for that appeal that the decision under appeal was not the correct PIP entitlement decision. However, she had stopped short of revising the decision under appeal and replacing it with the proposed revised decision, not because of any equivocation or tentativeness on her part about the merits of the proposed revised decision, but solely because to revise the decision would have led to the appellant's appeal to the tribunal ending and thus would have removed his ability to argue on that appeal for an award *higher* than the enhanced rate of the daily living component and the standard rate of the mobility component of PIP.

43. It was this picture with which the tribunal was confronted when it came to decide the appellant's appeal. The Secretary of State no longer considered her decision under appeal to be correct but the appellant still wanted the appeal to continue because, on the face of it, he considered he ought to be entitled to a higher award of PIP than the enhanced rate of daily living and the standard rate of mobility. Formally, the decision under appeal remained the 27 December 2018 decision awarding the appellant only the standard rate of the daily living component of PIP, because that decision had not been revised. However, in reality the dispute between the parties to the appeal had shifted to being one solely about whether the appellant ought also to

qualify for the enhanced rate of the mobility component of PIP (in addition to the enhanced rate of the daily living component)[2].

44. I would accept that the role of the First-tier Tribunal is equally, per *Gillies*, to determine the correct level of entitlement to benefit and its inquisitorial function means it is not bound by the views of the parties as to the correct level of entitlement. However, the First-tier Tribunal's inquisitorial function is not unbounded. Its primary and most obvious limit is that it only arises if an appeal is made by a claimant against the Secretary of State's decision. This trite consideration has, however, an importance on this appeal because it draws attention to what would have occurred had the Secretary of State revised the decision under appeal. In that circumstance the appeal would have lapsed because it was more advantageous to the appellant: per section 9(6) of the SSA 1998, regulation 52 of the DMA Regs 2013 *not* applying. The decision as revised would have awarded the appellant the enhanced rate of the daily living component of PIP and the standard rate of the mobility component of that benefit. If the appellant had not appealed that decision then the First-tier Tribunal would have had no jurisdiction (inquisitorial or otherwise) to exercise over that decision. However, even if the appellant had appealed that revised decision, the only matter he could wish to argue about on that appeal would be whether he satisfied the conditions of entitlement for the higher (enhanced) rate of the mobility component. As between the parties there would be no issue about whether a lesser award than the revised decision was merited.

45. The same outcome applies in my judgment in this case even though the decision under appeal was not in fact revised, though the analysis may be less obvious and requires a little more unpacking. The decision under appeal to the tribunal remained the 27 December 2018 decision awarding him only the standard rate of the daily living component of PIP. On the appeal tribunal's inquisitorial jurisdiction was limited by the terms of section 12(8)(a) of the SSA 1998. In effect that required the tribunal to consider any issue raised by the appeal. Paragraphs [27]-[28] of the Court of Appeal's decision in *Hooper v SSWP* [2007] EWCA Civ 495; *R(IB)4/07* are of relevance here. Those paragraphs read.

> "27. Section 12(8)(a) refers to an issue raised by the appeal. I see no reason not to give the statute its plain and natural meaning. But in view of the way in which Mr Chamberlain suggests "raised by the appellant" should be interpreted, it seems to me that there is no real difference between "raised by the appeal" and "raised by the appellant" as interpreted by him. The starting point will always be the decision of the SSWP that the appellant is seeking to challenge. But it is clear that the fact that an issue is not identified by the appellant in his appeal notice or even during the oral argument does not mean that it is not 'raised by the appeal'
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> 28.I would endorse the valuable guidance given in [*Mongan v Department of Social Development* [2005] NICA 16 (reported as *R 3/05* (DLA)]. The essential question is whether an issue is "clearly apparent from the evidence" (paragraph

[2] A subsidiary but related error of law was the failure of the tribunal to clarify with the appellant what it was that he was appealing about in the light of the Secretary of State's letter of 20 May 2019 and that he did not agree with the proposed revised decision.

> 15 in *Mongan*). Whether an issue is sufficiently apparent will depend on the particular circumstances of the case. This means that the tribunal must apply its knowledge of the law to the facts established by it, and it is not limited in its consideration of the facts by the arguments advanced by the appellant. I adopt the observations of this court in *R v Secretary of State for the Home Department ex parte Robinson* [1998] 1 QB 929 at page 945 E–F in the context of appeals in asylum cases. But the tribunal is not required to investigate an issue that has not been the subject of argument by the appellant if, regardless of what facts are found, the issue would have no prospects of success".

46. The 'starting point' of the Secretary of State's decision of 27 December 2018 in this case could not be the end point because it was obvious, in my judgment, that the Secretary of State was no longer seeking to uphold that decision. Furthermore, it was in my judgment 'clearly apparent from the evidence' at the beginning of the appeal hearing that the appellant's entitlement to the enhanced rate of the daily living component and the standard rate of the mobility component were not issues raised by the appeal. That evidence included not only the letter of 20 May 2019 and that which was set out in the Secretary of State's appeal response but also ought to have included the evidence explaining the Secretary of State's policy not to revise as I have set it out in paragraphs 33 and 34 above. As I have already explained, that policy shows an intent on the Secretary of State's behalf, as the holder of the social security budget and custodian of the social security legislative scheme, to only leave in issue before the First-tier Tribunal matters that go beyond the level of entitlement she is satisfied should be awarded in the proposed revision. Taking account of all of this, the tribunal was therefore wrong in law, in my judgment, to approach the appeal before it, as it did at the start of the appeal hearing before it, as if entitlement to the enhanced rate of the daily living component or the standard rate of the mobility component were still in issue on the appeal.

47. Once this correct starting point is recognised, in my judgment the tribunal was required as a matter of law and considerations of fairness underpinning that law to put the appellant on notice if an issue was, or became, clearly apparent from the evidence about the appellant's entitlement to the standard rate of the mobility component or his entitlement to the daily living component. And given the appellant was unrepresented and has autism, fairness in these circumstances may very well have necessitated adjourning the appeal: see, by way of example, paragraphs [26]-[32] of *MS v SSWP* (DLA and PIP) [2021] UKUT 41 (AAC). The tribunal gave no such consideration and proceeded, without any appropriate 'warning', to investigate and determine whether the appellant had any entitlement to the mobility component of PIP, and that constituted a material error of law on its part.

48. I should add that whether as part of the above error of law, or as a separate error of law, it seems in my judgment that the tribunal also erred in law in failing to have any regard to the explicit request that the Secretary of State made to it in her written appeal response that the tribunal "support changing" the decision under appeal to one that the appellant was entitled to the enhanced rate of the daily living component and the standard rate of the mobility component of PIP.

49. I do not accept, however, the argument by Mr Williams for the appellant that the lawfulness (or otherwise) of the Secretary of State's policy not to revise decisions under appeal has any material bearing on the first ground of appeal. That issue is shortly to be determined in the *K* case referred to above but it has no direct bearing on this appeal, as was agreed before me. Mr Williams argued that it had an indirect bearing because if the policy was unlawful – that is, the Secretary of State was required as a matter of law to revise the decision under appeal with the consequence that the appeal against that decision would lapse – that would make it all the stronger that the tribunal ought to approach the appeal before it as if it only concerned whether the appellant was entitled to a higher award of the mobility component. I do not follow why that is so and do not see why the same would affect differently the analysis I have arrived at above. The critical consideration in the above analysis is that the Secretary of State as a matter of fact was satisfied that her decision which was the subject of the appeal was not correct. That consideration stands whether she ought to have revised the decision under appeal or not (and if she had in fact revised it then the argument (and the appeal) would fall away in any event).

50. I return lastly, and briefly, to the failure of the Secretary of State's letter of 20 May 2019 to tell the appellant that he would be able to make a fresh appeal against the decision if it was revised. It seems to me that that omission was unfortunate, although it does not directly affect this appeal. It is true, as the Minister said, that a right of appeal would arise against the decision as revised, but as he stated that information would only be provided to the claimant once the decision had been revised. However, the policy is concerned with appellants making properly informed decisions *before* the decision has been revised (or not). Caselaw such as *R(Reilly and Wilson) v SSWP* [2013] UKSC 68; [2014] AC 453; [2014] AACR 9 and *SSWP v Jeffrey and Bevan* [2016] EWCA Civ 413; [2017] QB 657 (and see also my decision in *NM v SSWP* (JSA) [2016] UKUT 351 (AAC)), might suggest that administrative fairness would require claimants to be informed of all relevant considerations before deciding whether to 'agree' with the proposed revised decision, and that would include knowing that they would have a fresh right of appeal against the revised decision.

51. For the reasons given above, the appeal succeeds and I give the entitlement decision set out above.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 2 July 2021