

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No: CDLA/4998/2014

Before UPPER TRIBUNAL JUDGE KNOWLES QC

Decision: The appeal is allowed. The decision of the First-tier Tribunal (the tribunal) sitting at Bury on 11 July 2014 under reference SC268/14/00095 involved the making of an error on a point of law. The tribunal's decision is set aside and the case remitted to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out at the conclusion of the Reasons below.

REASONS FOR DECISION

The Issue in this Appeal

1. The main issue in this appeal is whether the First-tier Tribunal ["the tribunal"] erred in law by refusing to allow the mother of a child claimant to present a video recording of her son in evidence to the tribunal. It was and remains her case that this material was pertinent to her son's claim for Disability Living Allowance [DLA].
2. I have come to the conclusion that the tribunal gave inadequate reasons for its refusal and thereby materially erred in law. I allow this appeal and remit the matter to the First-tier Tribunal for rehearing.

Factual Background

3. The Appellant was a 9 year old boy at the time of the relevant decision by the Respondent on 4 January 2014. His appointee is his mother who brings this appeal on his behalf. The Appellant has been diagnosed with Tourette's syndrome. It is on the moderately severe spectrum of the disorder and his symptoms include vocal, motor, and sensory tics as well as associated Obsessive Compulsive Disorder [page 90].
4. On 4 January 2014 a decision was made by the Secretary of State that the Appellant was not entitled to either the mobility or the care component of DLA. The Appellant's mother appealed the decision on the basis that the Secretary of State had not fully considered all the information provided. She explained that her son could suppress his complex tics in school or blend in some of his minor tics in a structured environment. He did need guidance and supervision when out of doors to avoid danger due to his condition and he needed frequent, prolonged

and repeated attention greater than that of a child of his age who did not have a disability.

5. Prior to the hearing of this appeal on 11 July 2014, the Appellant's mother asked to share with the tribunal video footage on her mobile phone of her son's Tourette's releases. She said that she thought this was valid evidence to show the issues he faced on a daily basis [letter dated 26 June 2014, page 92]. On 1 July 2014 a tribunal judge noted that she could not do so as the Respondent needed a copy 7 days before the hearing. The note recording the judge's decision ended with the words "*she can transfer it to a disc, send in three copies*" [page 93]. The Appellant's mother never saw a copy of this internal memo. On 2 July 2014 she was sent a letter by the Tribunals Service which stated that the tribunal judge dealing with her son's appeal had confirmed that he did not need to see the video footage since the medical evidence on file and his knowledge of Tourette's would be sufficient to deal with the appeal [page 133].
6. On 4 July 2014 the Appellant's mother sent an email saying that the video footage was some 30 seconds long and that she wanted to show it in order "*...to illustrate how the condition affects my child and this is different to having a knowledge of a condition...the clip illustrates some of his vocal releases and some of the motor tics he has I just feel it is useful evidence and have been advised evidence can take various forms...*" [page 131]. On 8 July 2014 the Tribunals Service sent the Appellant's mother another letter in response to her email request. This stated that the tribunal judge hearing her son's appeal had reiterated that it was not necessary to see the video footage.
7. At the start of the hearing on 11 July 2014 the tribunal declined the Appellant's mother's invitation to view the video footage. The discussion about this issue is not recorded in the Record of Proceedings [pages 95-97]. The tribunal dismissed the Appellant's appeal and confirmed the Secretary of State's decision that the Appellant was not entitled to DLA.
8. On 15 July 2014 the Appellant's mother sought a set aside of the tribunal's decision in part because she had been refused permission to show the video footage of her son to the tribunal. Her letter stated: "*...On the day the judge stated it can be difficult for them as a panel to gain a picture of [the Appellant's] vocal and motor releases. I asked him would the video footage I had on my phone therefore not be useful evidence. He stated it was difficult in terms of the Tribunal providing devices to play this evidence under reasons of health and safety with regards to equipment being brought to the hearing to accommodate my request. I advised it was on my mobile phone and quite easy to share as I had advised in writing on several occasions...*"
9. On 21 July 2014 the application for set aside was refused. The decision notice stated that: "*The Tribunal were satisfied that it had adequate evidence both in terms of medical reports and the oral evidence of [the*

Appellant's mother] to reach a decision. Mobile phone footage was a 'snapshot' at that time on that day. The tribunal accepted that the condition was worse at some times than others. Our decision was based on the entirety of the evidence".

10. The Appellant's mother sought permission to appeal the tribunal's decision on the basis that the tribunal's approach to the video footage had been unfair and it had not taken into account some of the evidence before it in reaching its decision. The First-tier Tribunal refused permission to appeal on 23 September 2014.
11. On 26 January 2015, Upper Tribunal Judge Levenson gave permission to appeal on the following grounds:
"It is arguable that the refusal to let the claimant's appointee present the evidence that she wanted to present or to facilitate its presentation amounted to a breach of the rules of natural justice and procedural fairness, and that the First-tier Tribunal should have considered the effect of a highly structured and disciplined school environment when seeking to make comparisons between behaviour at home and at school".
12. The Secretary of State has filed a response to the appeal which invites its dismissal on the basis that the tribunal had considered all of the evidence available to it and had applied the principles in CDLA/3779/2004. Further he submitted that the tribunal had provided adequate reasons for deciding not to view the video footage.
13. The Appellant requested an oral hearing of this appeal. I held such a hearing in Manchester on 29 July 2015. The Appellant's mother appeared to represent his interests and the Secretary of State was represented by Mr James. I am grateful to the parties for their submissions on that day.
14. This ruling will concern itself with the grounds on which Upper Tribunal Judge Levenson gave permission to appeal.

First Ground of Appeal: Procedural Fairness

15. In paragraph 2 of its Statement of Reasons, the tribunal stated that it had declined an invitation at the start of the hearing to view the mobile phone footage of [the Appellant] when experiencing a problems with his Tourette's. It stated that it was clear from the papers that this problem was episodic and the tribunal needed to get a broad view of how any condition affecting [the Appellant] gave rise to needs that were substantially in excess of those of another child of the same age not only during an exacerbation.
16. The Respondent submitted that the tribunal's reasoning in both the Statement of Reasons and the Set Aside decision was adequate. He referred me to a decision by Upper Tribunal Judge Rowland, namely LN

v Surrey NHS Primary Care Trust [2011] UKUT 76(AAC). He further submitted that it was reasonable of the tribunal to conclude from the Appellant's mother's description that the video footage was so lacking in probative value that it need not even be looked at. A 30 second video clip was likely to be irrelevant to the tribunal's decision about the Appellant's needs for the majority of the time.

17. The Appellant's mother drew my attention to her repeated requests to show this material to the tribunal and to the evidence that the school had viewed video footage which it described as "a sharp contrast to what we see at school" [page 74]. At the hearing she confirmed to me that the school had seen the same video material which she wished to show to the tribunal.
18. LN v Surrey NHS Trust [2011] UKUT 76 (AAC) is authority for the proposition that the relevance of any piece of evidence to the decision which the tribunal had to make is a key consideration. Irrelevant evidence should not be admitted. However Upper Tribunal Judge Rowland went on to say that:
"24. However relevance is not the only consideration. The First-tier Tribunal is also entitled to consider the weight of the evidence when deciding whether to admit it. Generally, it is likely to admit the evidence for consideration and consider its weight only when deciding whether or not to accept it, but it is entitled to exclude weak evidence on the ground that its prejudicial value is far higher than its probative value..."
19. In this case, the tribunal did not admit the video footage as evidence which it considered when reaching its decision. It took that decision prior to the hearing when it told the mother by letter on both 2 July 2014 and 8 July that it was not necessary to view this material as the medical evidence on file and the tribunal judge's own knowledge of Tourette's Syndrome would be sufficient to deal with the appeal. The reasons it gave on 21 July 2014 for refusing the mother's application for set aside again made reference to the adequacy of evidence from other sources and, for the first time, referred to the footage as merely being a snapshot at that time on that day. It stated that it accepted that the Appellant's condition was worse at some times rather than others. In this context, the Statement of Reasons referred to the Appellant's condition as being episodic and referred to the need for a broad view of how the Appellant was affected by his condition. Looking at the tribunal's reasoning in the round, it seems to me that the tribunal was saying that, in the context of the other evidence and its own expertise, the weight it could accord to this video footage was so slight that it was unnecessary to view it.
20. Was the tribunal's ruling on this issue reasonable and adequate? I remind myself that tribunals are not as strictly bound to the rules of evidence as they are applied in a court of law. Further, evidence is relevant if it satisfies two requirements: first, it must directly or indirectly be probative of a fact; and second that fact must be material to an issue which the tribunal has to decide.

21. In this case, there appears to be no dispute that the evidence was relevant. It was illustrative of how Tourette's Syndrome manifested itself in this particular child and thus was probative of that fact. Further I find that how this syndrome manifested itself in this child was highly material to the tribunal's consideration of the statutory test for entitlement to DLA in children and young persons. In summary, that test required the tribunal to consider whether this child had attention or supervision requirements substantially in excess of the normal requirements of a child of the same age in normal physical/mental health.
22. If this evidence was relevant, was the tribunal right to refuse to receive it? Generally a tribunal should receive evidence from all parties. In this case, the tribunal decided not to receive the video footage having come to the conclusion that the weight it could give to this material was so slight that it did not need to view it. I find that in so doing it materially erred in law.
23. First, the tribunal never viewed the video footage – that, in my view, undermined its conclusion that the weight it could give this relevant material was so slight that it should not be received in evidence. Second, its judgment about the evidential weight it should accord this relevant material was founded on an assumption that “a snapshot” of the Appellant's behaviour on one day was of limited value when it needed to come to a broad view about the Appellant's functioning and need for care. However that same criticism could be applied to other sources of evidence on which the tribunal actually relied. Thus, in paragraph 11 the tribunal noted from one hospital letter that the Appellant had been well-behaved in clinic and used this piece of evidence - alongside similar evidence from the school - to support its conclusion that the Appellant was as capable going out unsupervised as any other nine-year old. Had it viewed the video footage, this might have supported the Appellant mother's submission that the Appellant did in fact require supervision when going out, but unfortunately the tribunal's stance deprived the Appellant's mother of the opportunity to evidence her case.
24. Finally, the tribunal overlooked evidence from the school that the video evidence it had seen of the Appellant's behaviour at home was in marked contrast to what was seen in school. I pause to observe that (a) differences between behaviour in school and at home are matters to which a tribunal seised of a DLA case concerning a child ought to pay particular regard and (b) the school did not detail the content of that video evidence. One might reasonably think that, if the tribunal was offered an opportunity to view behaviour outside the school setting on video, it would take the opportunity to do so in order that its assessment of functioning across all settings might be more soundly based. This tribunal failed to avail itself of that opportunity because it failed to have regard to the school's comment about the video footage. Its reasoning for the decision not to admit the video footage was in my judgment thereby rendered inadequate and in error of law.

25. Having regard to all of the evidence before me, I am left with the distinct impression that the tribunal's refusal to admit this video footage had more to do with the form of the evidence – that is, it was not paper but video – and the difficulty of obtaining suitable equipment to play it at the hearing. In this context I note the contents of the letter sent by the Appellant's mother when asking for a set aside. I am also left wondering whether the tribunal would have refused to admit a letter or statement describing the Appellant's Tourette's releases on the basis that this too was but a "snapshot". I suspect not.
26. Be that as it may, I am satisfied that by refusing to admit the video footage in evidence the tribunal gave inadequate reasons for its decision and thereby materially erred in law. Its decision was also procedurally unfair in that the Appellant's mother was denied an opportunity without good reason to present relevant evidence in support of her case. I allow the appeal on this ground

Second Ground of Appeal: The Effect of the School Environment

27. Upper Tribunal Judge Levenson stated that the tribunal may have erred by failing to consider the effect of the school environment when looking at comparisons between the Appellant's behaviour at home and in school.
28. The Secretary of State's submission referred me to the case of CDLA/3779/2014 and asserted that the tribunal had applied the principles in that case because it had looked at the totality of the evidence and had not solely relied on the absence of care needs and supervision needs in the school report in order to reach its decision.
29. CDLA/3779/2014 – as quoted by the Secretary of State at page 120 of the bundle – enjoins tribunals hearing a case such as this to have particular regard to the nature of the school environment when evaluating evidence from a child's school. It makes the important point that *"young children at school have to be more or less continually supervised for the school to function properly so that a child with a disability may not need supervision over and above that which is normally given to all other children while attending the school. However children with disabilities may need supervision beyond that needed by other children when outside the school environment in order to avoid substantial danger to themselves or others..."* [paragraph 9]
30. Did the tribunal have regard to this factor? On the evidence before it, there did appear to be differences between the Appellant's behaviour in school and outside school. However I can find no reference in the Statement of Reasons which indicates to me that the tribunal had regard to the need to pay particular attention to the school environment when assessing the Appellant's behaviour across all settings. Merely stating that it has considered all the evidence is insufficient in a case where,

prima facie, there was an apparent distinction between the behaviour seen in school and that seen outside school. The tribunal should have specifically addressed the difference in the school environment from that of the home when coming to its conclusions.

31. I conclude that the tribunal erred in law by failing to pay specific regard to the principles set out in CDLA/3779/2014.

Conclusion

32. I allow the Appellant's appeal against the decision made by the First-tier Tribunal on 11 July 2014. I set aside the decision of the tribunal [Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)].
33. The case must be remitted for re-hearing by a new tribunal subject to the directions below. If the Appellant's mother wishes to rely on the video footage which is within the appeal bundle in disc form, the tribunal should make arrangements for suitable equipment on which it can be viewed at the new hearing. The Secretary of State should also be sent a copy of this material by the Tribunal Service in advance of the hearing.
34. I make it clear that I am making no finding nor expressing any view on whether or not the Appellant is entitled to DLA. That is a matter for the good judgment of the new tribunal. That tribunal must review all the evidence and make its own findings of fact.

CASE MANAGEMENT DIRECTIONS

35. The appeal should be considered at an oral hearing.
36. The new First-tier Tribunal should not involve the tribunal judge or medical member who was previously involved in determining the appeal on 11 July 2014.
37. A copy of this decision shall be made available to the new First-tier Tribunal re-hearing this appeal.
38. If the Appellant has any further evidence, in particular medical evidence or evidence about the support (if any) received in school, to put before the tribunal, this should be sent to the 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 by the Secretary of State under appeal (namely 4 January 2014).
39. If the Appellant's mother wishes to rely on the video footage which is within the appeal bundle in disc form, she should confirm this in writing to the tribunal office within one month of the issue of this decision. If this

material is to be relied upon, the tribunal office should make arrangements for suitable equipment on which it can be viewed at the new hearing. The Secretary of State should also be sent a copy of this material by the Tribunal Service in advance of the new hearing.

40. The differently constituted tribunal must conduct a complete rehearing of the issues that are raised by this appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
41. The tribunal must deal with any procedural questions, as may arise, on their merits.
42. The tribunal must consider all aspects of the case, both fact and law, entirely afresh.
43. The tribunal must not take into account any circumstances that were not obtaining at the date of the decision appealed against – see section 12(8)(b) of the 1998 Act – but may take into account evidence that came into existence after the decision was made and evidence of events after the decision was made, insofar as it is relevant to the circumstances obtaining at the date of the decision.

Gwynneth Knowles QC
Judge of the Upper Tribunal
21 August 2015.

[signed on the original as dated]