OM v Secretary of State for Work and Pensions (PIP) [2017] UKUT 458 (AAC)

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Fox Court First-tier Tribunal dated 5 January 2017 involved an error on a point of law and is set aside. (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)). The Upper Tribunal re-makes the decision on the claimant's appeal against the decision of the Secretary of State dated 22 July 2016 (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii). That decision as re-made is that the decision of 22 July 2016 that the claimant was not entitled to personal independence payment from and including 10 August 2016 and that entitlement to disability living allowance terminated after 9 August 2016 is set aside, because no negative determination under regulation 9(2) of the Social Security (Personal Independence Payment) Regulations 2013 is to be made, with the consequences set out in paragraphs 35 to 37 below.

REASONS FOR DECISION

1. The claimant appeals (through his wife as appointee) against the decision of the First-tier Tribunal with the permission of Upper Tribunal Judge Lloyd-Davies, granted on 26 June 2017. The written submission on behalf of the Secretary of State dated 12 September 2017 supported the appeal, but it was suggested that as the point in issue was an unusual one the case was not suitable for a decision without reasons. The claimant's representatives, Central England Law Centre, concurred with that submission without adding any further comments in their reply of 6 October 2017.

2. The case turns on the application of regulation 9 of the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations):

> "9.—(1) Where it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities, C may be required to do either or both of the following—
> (a) attend for and participate in a consultation in person;
> (b) participate in a consultation by telephone.
> (2) Subject to paragraph (3), where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination must be made.
> (3) Paragraph (2) does not apply unless—
> (a) written notice of the date, time and, where applicable, place for, the consultation is sent to C at least 7 days in advance; or
> (b) C agrees, whether in writing or otherwise, to accept a shorter period of notice of those matters.
> (4) In paragraph (3), reference to written notice includes notice sent by electronic communication where C has agreed to accept correspondence in that way and "electronic communication" has the meaning given in section 15(1) of the Electronic Communications

> Act 2000.
> (5) In this regulation, a reference to consultation is to a consultation with a person approved by the Secretary of State."

Regulation 10 provides that the matters to be taken into account in determining whether C has good reason under regulation 9(2) must include C's state of health at the relevant time and the nature of any disability that C has.

3. Regulation 2(1) of the PIP Regulations defines "C" as meaning "a person who has made a claim for or, as the case may be, is entitled to personal independence payment". For the meaning of "negative determination" one must turn first to section 80(5)(a) of the Welfare Reform Act 2012, which provides that regulations under subsection (4) (about requiring the provision of information or evidence and attendance at and participation in consultations) may include provision for "a negative determination to be treated as made if a person fails without a good reason to comply with a requirement imposed under subsection (4)". Then subsection (6) provides:

> "(6) In subsection (5)(a) a "negative determination" means a determination that a person does not meet the requirements of—
> (a) section 78(1)(a) and (b) or (2)(a) and (b) (daily living component);
> (b) section 79(1)(a) to (c) or (2)(a) to (c) (mobility component)."

Section 78(1)(a) and (b) contains the basic conditions of entitlement for the standard rate of the daily living component in terms of the claimant's ability to carry out daily living activities being limited by their physical or mental condition and of the claimant meeting the required period condition. Section 78(2)(a) and (b) does the same for the enhanced rate. Section 79(1)(a) to (c) contains the basic conditions of entitlement for the standard rate of the mobility component in terms of the claimant's ability to carry out mobility activities being limited by their physical or mental condition, of the claimant meeting the required period condition and of the claimant being over the prescribed age. Section 79(2)(a) to (b) does the same for the enhanced rate. I expressed the view in paragraph 23 of *KB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 537 (AAC) that, although section 80(5)(a) allows regulations to provide that a negative determination is to be treated as made and regulations 8 and 9 of the PIP Regulations provide that one must be made when there is a failure to comply, which is not quite the same thing, the compulsory making of a negative determination is probably close enough to deeming one to have been made for the disparity not to be a problem. I adhere to that view. Section 80(4)(c) authorises regulations to require participation in and attendance at a consultation at a place, date and time determined under the regulations.

The background

4. The claimant (date of birth 10 March 1956) had an award of the highest rate of the care component and the lower rate of the mobility component of disability living allowance (DLA). The papers before the First-tier Tribunal do not disclose for how long he had been entitled to DLA, the grounds for the award of the highest rate of the care component or whether the award was for a fixed or an indefinite period. The tribunal of 5 January 2017 found that his psychosis, the main problem, was of long standing and that the medication prescribed in 2016 indicated that his

symptoms would be towards the more severe. However, since he was not subject to any ongoing specialist input and his medication had remained the same for some time it concluded that the psychosis was relatively stable and that the medication was working reasonably effectively.

5. The claimant was apparently invited to claim PIP on 16 February 2016 and a telephone claim was taken on 19 February 2016. I assume that the telephone conversation was with the claimant's appointee, whose appointment for DLA purposes would have automatically transferred to the PIP claim by virtue of regulation 28 of the Personal Independence Payment (Transitional Provisions) Regulations 2013. No record of that claim was in the First-tier papers. I come back below to the significance of that. The claimant was sent a PIP2 (how your disability affects you) questionnaire, which was completed and signed by his appointee on 5 April 2016. The answers indicated severe problems with all activities because of the claimant's mental condition, plus breathlessness and pain. In the section on mixing with other people the appointee wrote "If he comes in contact with other people, he get very agitated and aggressive. Does not want to see anybody". In the section asking about any help that would be needed for a face to face consultation or whether a home visit might be needed, she wrote that an appointment would have to be at home due to mental health issues,

6. According to the contact history at pages 57 – 59, on 19 May 2016 Atos Healthcare sent the claimant's appointee a letter with an appointment for a consultation at the Barking centre. She telephoned on 21 May 2016 to say that the claimant would not be able to attend, but was told that he did not meet the criteria for a home consultation because of his "history of aggression". It was though suggested that an appointment could be offered nearer to the claimant's home in North London. After some further communications and the information that the claimant's GP had written a letter to say that a home visit was necessary, a "HP" (presumably a healthcare professional) stipulated that the consultation be at an assessment centre. On 9 June 2016 a letter was sent with an appointment at the Islington centre with a taxi authorised. On that date someone from Age UK who was helping the appointee had said that he would discuss the issue with the DWP. On 15 June 2016 the appointee telephoned Atos to say that she had been in contact with the DWP, who had said that they would contact Atos to request a consultation at the claimant's home. She was according to the Atos records told that that would not be possible and that a DWP request might not make any difference. No copy of any of the appointment letters was in the First-tier papers. I come back below to the significance of that as well.

7. In addition to that evidence from the Atos records, there is also a letter dated 29 September 2016 from the Age UK representative to the claimant in which he details his contacts with the appointee and with the DWP, clearly by reference to notes made at the time (pages 75 – 78) that was submitted with other evidence for the hearing on 5 January 2017. That letter includes these entries for 15 and 16 June 2016:

> "<u>15 June 2016</u>
> Phone call from client wife who advised that DWP had informed her they had received the letter [from the GP] and have sanctioned a home visit when she spoke to them on Monday, she has not received a letter concerning this.
> Client's wife was concerned as the previous appointment for tomorrow is still booked as

> Atos had told her they have not received notification about the home visit being authorised. Phone call to client wife to advise I tried to call dwp but could not get through advised her to keep on calling to find if tomorrow's appointment is cancelled.
>
> 16 June 2016
> Phone message left from client on 15/6/16 at 4.10 pm on calling back today client's wife advised that they got through to DWP last night and was advised that client will be sent a new appointment."

There were later entries for 21, 22 and 24 June about a DWP case manager agreeing to contact the appointee to discuss a way forward, possibly including a paper-based assessment, which contact appears not to have happened (according to the Secretary of State's written submission to the First tier two attempts to contact the appointee on 4 July 2016 were unsuccessful). I have no reason whatsoever to doubt the accuracy of the representative's notes, but what the appointee said she was told by Atos is not entirely consistent with their records. More important, what the appointee said about being told by the DWP on the afternoon of 15 June 2016 that a new appointment would be sent (necessarily entailing a lifting of any requirement to attend on 16 June 2016) is not consistent with the evidence she gave on 5 January 2017 as recorded in the record of proceedings. There she seems to have confirmed that she was left at the end of her conversation with Atos on 15 June 2016 with no doubt that the claimant was still being required to attend the consultation on 16 June 2016. There also seems no reason why she should recount (pages 93 and 94) how on 16 June 2016 she tried all she could to convince the claimant to go to the appointment if she had been told the afternoon before that he was not required to attend. But she also according to the record of proceedings said that after the claimant refused she telephoned Age UK and they said they would speak to the DWP, which might suggest some confusion about dates.

8. The claimant did not attend the appointment on 16 June 2016. The tribunal of 5 January 2017 recorded the appointee's evidence about his unwillingness as follows in its statement of reasons:

> "20. [The appointee] detailed that it was very difficult to get [the claimant] to leave the house, mainly due to reasons connected with his mental health condition. We noted from the GP records summary (page 79 – 81) that he sees his GP infrequently. He did leave the house in 2015 to attend Moorfields hospital for a medical appointment relating to his eyes which have cataracts. [The appointee] detailed that it had been very difficult to get him to leave the house on that occasion. It had required both of their sons to attend at their home and for [the claimant] to be driven to the appointment.
> 21. [The appointee] was asked at the Tribunal hearing why she did not get their sons to attend their home and drive [the claimant] to the medical assessment on 16/06/16. She stated that this was because [the claimant] did not want to attend the assessment and that in those circumstances it was not possible for her or her sons to make him attend."

The decision under appeal

9. The decision was made on 22 July 2016 that the claimant was not entitled to PIP from and including 10 August 2016, according to the submission to the First tier, "because he failed to attend

or participate in a consultation to enable DWP to assess entitlement". The written submission to the First tier referred to regulations 9 and 10 of the PIP Regulations, but did not go through the chain from a negative determination to a consequent non-entitlement decision. The absence of good reason was mentioned in the decision notification letter and discussed in the submission.

10. The submission also noted that payment of DLA on the existing award ceased after 9 August 2016. There was no copy of the decision of 22 July 2016 itself in the papers, but the copy of the notification letter of the same date (pages 62 – 64) is headed "Personal Independence Payment and the end of your Disability Living Allowance" and notifies both the end of DLA entitlement and the disallowance of PIP. The written submission ascribed the effect on DLA entitlement to regulation 17(1)(b) of the Personal Independence Payment (Transitional Provisions) Regulations 2013, but that was incorrect. That provision only applies when there has actually been an assessment determination by a decision maker under regulation 4 of the PIP Regulations. The applicable provision in the circumstances of the present case was regulation 13(1)(a) of the Transitional Provisions Regulations, which takes away entitlement to DLA where there has been a negative determination under regulation 9(2) of the PIP Regulations (as well as under regulation 8). I shall come back briefly to DLA below in setting out the consequences of my substituted decision.

The First-tier Tribunal's decision

11. As already noted, the claimant's appointee attended the hearing on 5 January 2017 and gave quite extensive evidence. The tribunal disallowed the appeal. I have already quoted what it said in its statement of reasons about the severity of the claimant's psychosis. It also discounted the GP's statement in one of a series of letters that the claimant was housebound, as representing an escalation after the lack of success of earlier letters and following from what the appointee had told him rather than any direct assessment of the claimant. Then the tribunal's essential explanation for concluding that the claimant did not have a good reason for failing to attend was in the final two paragraphs of the statement:

> "24. Whilst it may have been desirable for ATOS to offer [the claimant] a home appointment for his assessment their policy is not to do this where they have concerns for their staff's welfare due to aggression issues being outlined in the claim form. We noted the [Secretary of State] did indicate that a home assessment would be requested, however, this was not offered by ATOS in this case. The Tribunal was satisfied that [the appointee] and [the claimant] were aware of the importance of [the claimant] attending the appointment offered on 16/06/16 and the potential adverse consequences of him not attending.
>
> 25. Taking the evidence as a whole the Tribunal concluded that the impact of [the claimant's] medical conditions were not so severe that they made him incapable of attending the assessment on 16/06/16 at Islington assessment centre. We were satisfied that he understood the potential consequences of his non-attendance upon his future benefit entitlement. We concluded that he did not attend through a conscious choice rather than because his mental and physical health conditions prevented him from attending. In these circumstances his appeal was not successful."

The statement made no mention of the Age UK letter of 29 September 2016.

The appeal to the Upper Tribunal

12. The main ground relied on in the application to the Upper Tribunal for permission to appeal was that the tribunal of 5 January 2017 should have considered whether a telephone consultation under regulation 9(1)(b) of the PIP Regulations should have been offered, which might have alleviated the alleged risks, and should have considered the arguments for and against offering a home consultation. Judge Lloyd-Davies considered that the point about the telephone consultation deserved further consideration. The Secretary of State's representative in the submission of 12 September 2017 suggested that as there was a discretion in regulation 9(1) about what, if anything, should be required by way of a consultation, the tribunal should have considered the suitability of a telephone consultation and recorded its conclusion.

13. I agree with the general thrust of the Secretary of State's submission, but what that submission does not go on to do is to work out how consideration of a telephone consultation fits into the overall structure of regulation 9 of the PIP Regulations with its division of responsibilities for different parts of the process. That throws up a number of difficulties and peculiarities, some at least of which I explore below. It is convenient to look at that overall structure first, before considering how far the tribunal of 5 January 2017 may or may not have gone wrong in law. To some extent what is said in the following section must be regarded as provisional, because not every point turns out to be necessary to the decision in the present case and I have had no submissions from the parties directed to these wider issues. However, I regard it as helpful to try to make at least a first attempt at some relatively coherent overall approach.

The overall structure and context of decision-making under regulation 9 of the PIP Regulations

14. I have already noted in paragraph 3 above that in my view regulation 9 was validly made under section 80(5)(a) of the Welfare Reform Act 2012. In my view it is also validly made under section 80(4)(c). The specification of the date, time and place of the consultation, although it appears only in the parts of regulation 9 about when a negative determination is to be made, must by necessary implication apply to the imposition of the requirement under paragraph (1), so as to satisfy section 80(4)(c).

15. One essential element of context in cases of compulsory transfer from DLA to the PIP regime is that there is a DLA award in existence. In *GD v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 415 (AAC) the Secretary of State provided the following information to the Upper Tribunal (paragraph 5 of the decision);

> "a. PIP Reassessment Claimants are asked at the outset if they want the DWP to include their DLA medical evidence when considering the PIP claim. Where DLA medical evidence is used, then that evidence will be attached to the claimant's PIP file and marked as supporting that PIP decision. This will be kept for at least 2 years if the PIP decision was a disallowance. Or longer if the decision was an award. If there has been no request from the claimant to use their DLA medical evidence for their PIP claim then the old DLA evidence will be destroyed 14 months after the DLA decision has terminated. The PIP retention period is 24 months if the evidence is classified as supporting. Once the DLA evidence has been included as part of the PIP claim it will have the same retention as any other PIP supporting document."

In the present case, as appears to be standard, although the schedule of events in the written submission to the First tier recorded the receipt of a valid telephone claim, no details were given of the answers given in the telephone conversation or of any document generated as a result. I can see no reason why a person in the position of the claimant's appointee in the present case, if asked the question that they should be asked, would not say that they wanted the DLA supporting evidence to be included when the PIP claim was considered, so will proceed on the basis that such a request was made. As it is, the First-tier Tribunal was left with only the very limited information mentioned at the beginning of paragraph 4 above.

16. In its terms, regulation 9 appears to allow anyone to require a PIP claimant to attend a consultation with an approved person at the specified date, time and place. However, there are two initial conditions that can only be met through the exercise of judgment on behalf of the Secretary of State. First, it must fall to be determined whether the claimant has limited ability or severely limited ability to carry out daily living or mobility activities. Only the Secretary of State is in a position to know whether that condition is satisfied. It will clearly be satisfied where there is an ordinary new claim for PIP, where there is an invited claim under the transfer from DLA provisions or where the Secretary of State considers, in accordance with regulation 11 of the PIP Regulations in a case where there is an existing PIP award, that it should be determined afresh whether the claimant continues to have limited or severely limited ability. A second condition must then be considered, because regulation 9(1) provides a discretion ("may be required"). A consultation is not a compulsory part of the decision-making process. The Secretary of State may consider that there is sufficient evidence already available to determine the claim, including cases where the Secretary of State is satisfied that the assessment under regulation 4 (which is always something carried out by a decision-maker on behalf of the Secretary of State and not by whoever carries out the consultation) can be made without a consultation. A common example will be where a claimant makes a repeat claim immediately after a disallowance decision based on a consultation report. In such circumstances, the Secretary of State will presumably simply not put the case into the process of reference to whatever body is organising PIP consultations, perhaps after seeking advice from an approved person or other medical adviser, perhaps not. The judgment about whether the condition of its not being proper to decide the claim without a consultation is one that in its nature can only be made on behalf of the Secretary of State.

17. The relevance of that second condition in the present case is that the Secretary of State will have known when the claimant had been awarded the highest rate of the care component and the lower rate of the mobility component of DLA, whether that award was for an indefinite period (indicating an opinion that the claimant's condition was not likely to improve) or for a fixed period, the evidence, medical and otherwise, on which the award was based and whether there had been earlier awards. I have said that I am proceeding on the basis that the claimant's appointee had requested that the DLA medical evidence be included when considering the PIP claim. However, even if that was not the case, the Secretary of State would still have had that evidence. I do not need to decide whether, in an appeal from a disallowance decision following a negative determination under regulation 9, a First-tier Tribunal is empowered to decide that the Secretary of State should never have referred the case for a specific consultation date etc to be required. That is unnecessary because I conclude below that in such an appeal the question of what the results of the

disputed consultation would have been likely to add to the evidence already in the possession of the Secretary of State is a relevant factor in determining whether the claimant had good reason for failing to participate in or attend the consultation (see the further discussion in paragraphs 23 and 29 below).

18. If the Secretary of State considers that the two conditions mentioned above are met, can he leave the imposition of the specific regulation 9 requirement to anybody at all? It must be the case that for a requirement to lead to the consequence prescribed in regulation 9 in accordance with the powers granted in section 80(4)(c) of the Welfare Reform Act 2012 it must be a requirement to attend and participate in a consultation at a particular date, time and place. Further, the requirement must be communicated as a requirement to the claimant. It could be argued that regulation 9 follows on from regulation 8, which allows only the Secretary of State to require a claimant to provide information or evidence, so that the regulation 9 power is also so limited. I consider that unlikely. Rather, the contrast of the language between the two provisions indicates the absence of that limit in regulation 9. But the definition of consultation as a consultation with a person approved by the Secretary of State must imply a limitation that the requirement must be imposed either by such a person or by an organisation with which such a person is associated for the purposes of carrying out consultations, or by or on behalf of the Secretary of State. No doubt, if Atos has been contracted by the Secretary of State to supply such services in the area concerned, they can exercise the regulation 9 power. On the element of requirement, something worded as a request rather than a creation of a legal obligation may not count (see the House of Lords in *Secretary of State for Social Security and another v Remilien* [1998] 1 All E.R. 129, R(I) 13/98). A question arises whether it is sufficient on appeal merely to provide evidence of the date on which a letter had been sent by Atos, to whom and at what address, and of the date of the appointment given in the letter, without providing a copy of the specific letter or at least a copy of the standard letter in use at the time with something to indicate that that was the form used in the particular case. Only then could a tribunal be satisfied that the claimant had been *required* to attend and participate (see R(S) 1/87, paragraph 12(1), where it was said that notices of a similar kind were to be strictly construed). The severe consequences of a failure to attend and participate would support such a strict construction. In my provisional view (provisional because the point has not been covered in any submissions) it is in general necessary to provide at least a copy of a standard letter with something to indicate that that was the form sent to the claimant. I deal in paragraph 27 below with how far breach of such a rule is material in the present case,

19. I flag up, for possible consideration in other cases, a problem arising from the fact that the claimant had an appointee. The letters from Atos were recorded as having been sent to her. The functions to be carried out by a PIP appointee are, under regulation 57(4) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013, exercising any right to which the claimant might be entitled and receiving and dealing with any sums payable to the claimant. In addition, regulation 57(5) allows anything required by those Regulations to be done by or in relation to the claimant to be done by the appointee. Regulation 57(5) only extends to things required by the Claims and Payments Regulations, not to things required by other regulations. There must therefore be some doubt whether, under regulation 9 of the PIP Regulations, which uses the terms of the person who is to attend and participate being required to do so, it is sufficient to address a letter containing the

requirement to the claimant's appointee. On the other hand, of course, it can be argued that, in order to give regulation 9 practical efficacy, in an area where a significant number of claimants can be expected to be unable to act so that a letter directed to the claimant personally might well be ineffective, communication through the appointee would suffice. In some circumstances, where a claimant has agreed to a person acting as their agent, it may be that the consequences of that relationship (e.g. that notice to the agent is notice to the principal) can subsist alongside the consequences that follow from being a statutory appointee (see *Tkachuk v Secretary of State for Work and Pensions* [2007] EWCA Civ 515, reported in R(IS) 3/07, which concerned a solicitor and client, and *GD v Secretary of State for Work and Pensions (PIP)* [2008] UKUT 415 (AAC)). Many difficult issues arise, which must be left for decision in other cases.

20. If there has been a requirement to attend and participate in a specific consultation imposed in a letter from Atos under regulation 9(1), is that the end of the matter so far as the Secretary of State is concerned? I do not think that it can be, despite Atos in the present case seeming to regard requests from the DWP for a consultation at the claimant's home instead of in the Islington centre as irrelevant. That stems from the general discretion whether or not to proceed to make a decision on the claim without a consultation. It must be open to the Secretary of State to withdraw a claimant's case from the consultation process entirely and in that sense lift the requirement for the claimant to attend even if Atos has not cancelled the appointment. But whether the Secretary of State could intervene to require a different kind or place of consultation from that already required seems more difficult and might turn on contractual arrangements between the Secretary of State and Atos about which I know nothing. What does though have to be taken into account when considering good reason is any confusion created by interventions in the process by the DWP.

21. If a claimant fails without good reason to attend or participate in a consultation they have been required to attend in accordance with regulation 9 as explored above, then a negative decision must be made by the Secretary of State. If it is once accepted that the requirement has been properly imposed, then I think that "failing" to attend must mean simply not attending. The requirement has supplied the legal obligation that is then breached by not attending. That is subject to possible arguments that it is disproportionate to regard late but not very late attendance as a failure (see *SA v Secretary of State for Work and Pensions (JSA)* [2015] UKUT 454 (AAC)). I do not need to explore here what might or might not amount to a failure to participate. In general, all excuses for not attending according to what was specified in a valid notice are to be considered as part of determining whether or not there was good reason.

22. All personal factors relating to the claimant will obviously be relevant, not merely those identified in regulation 10 of the PIP Regulations. There is a difficult question, related to those discussed in paragraph 19 above, arising from the fact that the claimant had an appointee. Is the claimant then to be judged entirely on his personal circumstances or are the claimant and the appointee to be judged as some kind of combined unit? It was settled in the days when late claims could be backdated for "good cause" that from the date of appointment any delay or failure of the appointee in pursuing a claim would be imputed to the claimant (see R(SB) 9/84). But that was in the context of the appointee exercising any right to which the claimant might be entitled by pursuing a claim. It is not at all clear that the same approach would apply where the question is whether the conditions for the making of a negative determination, albeit relating to a claim, are

satisfied, when it is the claimant's own attendance at or participation in the consultation that is in issue. I would be inclined to say that that it is the claimant's personal circumstances only, which would include the possibility of seeking help from other people, that are relevant. However, I do not think that I should express a decided conclusion without having had submissions on the specific point.

23. The Secretary of State's submission of 12 September 2017 that the tribunal of 5 January 2017 should have had regard to whether a telephone consultation under regulation 9(1)(b) would have been more suitable is by implication an acceptance that factors outside the claimant's own personal circumstances are relevant. Since the submission raised no point about requirement to attend, the possibility of a telephone consultation could only have been said to be relevant to good reason. An argument could be raised to the contrary. It could be said that regulation 9 is concerned with consultations that a claimant has been required to attend and participate in, not with consultations that they have not been required to attend, so that a claimant who has actually been required to attend a particular consultation should attend and participate in it whether it is suitable or not and argue about the weight to be given to the resulting report after the event if the Secretary of State's decision turns out to be adverse. On that basis, only matters relating to the ability to attend and participate on the day (such as the claimant's own personal circumstances, travel difficulties, breakdown of care arrangements, weather etc, or, say, delay in the consultation centre beyond the time that a claimant could reasonably stay) might be relevant to whether there was good reason or not. I consider that that is too narrow a view. The words "without good reason" should not be artificially limited. In other social security contexts, for instance jobseeker's allowance and its predecessor, unemployment benefit, it has been recognised that in considering whether a claimant has good reason for not applying for a vacancy, the suitability of the vacancy is a relevant factor. In the present context, the fact that a judgment about the suitability of carrying out any consultation at all is built in to the process leading to a requirement to attend and participate in a particular consultation points towards a claimant being able to raise the issue of suitability on any appeal against a disallowance following a negative determination under regulation 9. I do not wish to give many examples in case they are thought to have a limiting effect, but it seems to me that the question of suitability plainly extends in the present context to consideration of what useful additional evidence a consultation would be likely to add in the particular circumstances.

Application of the principles to the present case

24. I can now, I hope, approach rather more briefly the question of whether the tribunal of 5 January 2017 applied the right principles of law, showed that it had done so and made the necessary findings of fact. There are multiple issues that, in combination, undoubtedly require the setting aside of its decision.

25. On the question of whether the claimant was required to attend the consultation on 16 June 2016, the tribunal failed to deal with effect of the Age UK's representative's evidence of his contacts with the appointee and the DWP (see paragraph 7 above). If what the claimant told the representative on 16 June 2016 was correct, it would have meant that the DWP had indicated to her, through the information late on 15 June 2016 that they would send a new appointment, that the claimant need not attend the consultation on 16 June 2016. Given the Secretary of State's

overall responsibility for the process and his right to withdraw a particular case from it (see paragraph 20 above), it seems to me that in those circumstances the claimant would no longer have been required to attend on 16 June 2016 even though Atos had not cancelled the appointment. However, there is the problem for the claimant's case of the inconsistency with the appointee's evidence of her efforts on 16 June 2016 to get the claimant to attend, which would have been unnecessary if the requirement had been lifted. In addition, if she thought that the requirement had been lifted, why did not that feature prominently in the appeal as a good reason for non-attendance? I think that it is possible that at the hearing on 5 January 2017 the appointee became confused about the dates on which different things happened, but nonetheless, the tribunal came to a clear conclusion that both the claimant and the appointee were aware of the importance of attending the appointment on 16 June 2016 and of the potential adverse consequences of non-attendance, which is inconsistent with any finding that the appointee reasonably believed that the requirement to attend had been lifted by the DWP. It would have been better if the tribunal had said expressly what it made of the evidence from the Age UK representative, but the failure to do so would be too flimsy a basis on its own for setting aside the decision of 5 January 2017. However, that weakness goes into the overall assessment of the decision.

26. The same goes for a potential argument that the history of communications between Atos, the DWP, the appointee and the Age UK representative prior to 16 June 2016 had created an impression that attendance on 16 June 2016 was, if not optional, still open to negotiation, such that it could be said that, whatever the Atos letter of 2 June 2016 said, attendance was not regarded as a matter of legal obligation. That impression was perhaps fostered by the use of the word "appointment" and by the evidence of some discussions after 16 June 2016 about booking another appointment.

27. As recorded in paragraph 18 above, my provisional view is that to support a disallowance decision based on regulation 9 of the PIP Regulations on appeal it is in general necessary to produce, if not a copy of the actual letter said to have imposed the requirement to attend and participate in the consultation, at least a copy of a standard letter with evidence that that was the form of letter sent to the claimant. That was not done in the present case. However, the present case is unusual in that there had been two previous appointments that had been cancelled after representations. The tribunal of 5 January 2017 was satisfied that in the course of the communications about that it was made clear to the claimant's appointee and to the claimant that he should attend a consultation at a consultation centre. In those circumstances I consider that that general requirement had been made as clear as if it had been set out in a letter. That is subject to the point discussed above of whether, in relation to attendance at the particular consultation on 16 June 2016, the interventions of the DWP had lifted the requirement that would otherwise have existed.

28. If the claimant was, immediately before the consultation of 16 June 2016, required to attend and participate, there can be no doubt that he failed to attend. The issue for the tribunal of 5 January 2017 was then whether that failure was without good reason. The tribunal apparently concentrated on the claimant personally and reached the specific conclusion that his non-attendance at the consultation on 16 June 2016 was due to conscious choice rather than to his physical and mental health conditions preventing his attendance. That conclusion could be defended on the ground that the tribunal was entitled to evaluate the evidence before it in that way and the

conclusion did not go outside the range of reasonable conclusions available. However, I consider that the conclusion was undermined by the tribunal's failure to take into account the fact that the claimant had an appointee and thus was accepted by the Secretary of State as being unable to act. Even if the tribunal took the view that the claimant was capable of organising his own attendance at the consultation, including organising the assistance of others, there needed to be an explanation of why that view overrode the acceptance that he was unable to act. It may also have been the case that the tribunal applied a somewhat wrong test in the concluding paragraphs of the statement of reasons in asking itself whether the claimant was "incapable" of attending the consultation on 16 June 2016 or whether his mental and physical health conditions "prevented" him attending. Those are arguably more onerous tests than whether the claimant had good reason for not attending, even if attention is restricted to the claimant's personal circumstances. They are at the least different tests from that laid down in regulation 9.

29. However, where in my judgment the tribunal fundamentally went wrong in law was in excluding consideration of the suitability of the consultation of 16 June 2016 in the sense set out in paragraph 23 above. While the tribunal mentioned that it might have been desirable for the claimant to have been offered a home appointment, it drew no consequences from that view and by indicating that it had to consider the appointment actually required by Atos showed that it was excluding the suitability of that particular consultation as a factor. That was a material error of law. Even on the basis of the tribunal's view that the claimant was not incapable of attending the Islington centre, there were questions of the possible risks to his own health if forced to attend or possibly to his appointee and members of staff at the centre, even though the Atos rules were based on potential violence being more easily dealt with at a centre rather than in a claimant's home. Although the tribunal considered that the claimant's psychosis was relatively stable that was no doubt in the context of his ordinary day to day routine and could not be guaranteed under the particular stresses of having to go out to a consultation at an unknown place. More important, there were questions about the likelihood of the consultation, especially if under stressful conditions, producing any significant additional evidence. That is in the context of the claimant's existing entitlement to the highest rate of the care component and the lower rate of the mobility component, although with no further evidence produced of the terms of the most recent decision (indefinite or fixed period) or of what medical or other evidence supported the award. The award of the highest rate of the care component necessarily entailed the satisfaction of both the day-time and night-time conditions. It is also in the context of the claimant having been accepted as unable to act in the appointment of his wife for DLA purposes under regulation 33 of the Social Security (Claims and Payments) Regulations 1987 and of there apparently as at 16 June 2017 being continuing negotiations about the proper form and venue of any consultation. Questions arise about the suitability and likely usefulness of a consultation at the Islington centre, as opposed to a telephone consultation or a consultation at home (on the basis that Atos's rules cannot be allowed to be conclusive on suitability), or any consultation at all. I am not saying that the tribunal would inevitably have decided the appeal differently if it had applied this wider approach. I am merely saying that that might have made a difference.

Conclusion and disposal

30. For the reason given in paragraph 29 above, allied to the issues provisionally identified in paragraphs 25 to 28 above, the decision of the tribunal of 5 January 2017 involved a material error

on a point of law and must be set aside.

31. In the submission of 12 September 2017 the representative of the Secretary of State submitted that the matter should be directed to Atos to give proper consideration to the choices available to it regarding the manner and location of the examination. That course would be inconsistent with the duty and powers contained in section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007. Moreover, merely setting aside the decision of the tribunal of 5 January 2017 would leave the Secretary of State's disallowance decision of 22 July 2016 in existence, so something has to be done about the outstanding appeal against that decision. The claimant's representatives in the reply of 6 October 2017 merely expressed no objection to the case being remitted for rehearing.

32. I have concluded that in the circumstances I need not impose the further delay of referring the appeal against the decision of 22 July 2016 to a new First-tier Tribunal. I am in a position to substitute a decision on that appeal without having to resolve the issues of fact and law that are identified above as ones that should not be resolved without further input from the parties. Instead, I can adopt the factual basis found by the tribunal of 5 January 2017, augmented by elements of the evidence before it that have not been challenged, and apply the wider approach to "good reason" set out in paragraphs 23 and 29 above.

33. Thus I am prepared to approach the case on the basis (without having to decide the disputed issues) that immediately before the consultation of 16 June 2016 the claimant was under a requirement to attend and participate in that consultation at the Islington centre, so that on that assumption the issue for decision is whether the claimant's failure to attend was without good reason. For that purpose I adopt the context and questions identified in paragraph 29 above and am prepared to adopt the view of the tribunal of 5 January 2017 about the severity and stability of the claimant's mental condition (but not necessarily the implication drawn from that). That involves relying in particular on the Age UK's representative's letter of 29 September 2016 (pages 75 – 78), though not the accuracy or otherwise of what the claimant's appointee reported to him on 16 June 2016. I also have no doubt, whatever the objective position might have been, that the claimant's appointee genuinely believed as at 16 June 2016 that forcing the claimant to attend the consultation against his will would be damaging to his health and so find as a fact. I am not in a position to make any finding of fact above the claimant's own belief at that time.

34. My analysis of the situation is as follows. The nature of the claimant's disability and mental and physical condition (even if his psychosis was relatively stable in day to day life staying at home), the judgment that he was unable to act embodied in the appointment of his wife under regulation 33 of the Social Security (Claims and Payments) Regulations 1987 and the existence of an award of DLA (although of unknown length) including the highest rate of the care component of DLA raised questions at least about whether a consultation at a consultation centre was suitable. There had not been any express consideration of whether a telephone consultation would be more suitable. It appears wrong in principle that Atos's own self-imposed rules about the criteria for accepting a consultation at a claimant's home should control a tribunal's judgment of whether a consultation at a centre is suitable or not. It is not clear to me that, if the entry on the PIP2 form about getting aggressive when coming into contact with other people was enough to give rise to a risk to the

health of Atos staff, that risk would be much less in the unfamiliar environment of a consultation centre than in the claimant's home. All those factors point towards a conclusion that the consultation on 16 June 2016 was not suitable in the sense set out in paragraph 23 above, though the question whether they amount to a good reason for non-attendance would be quite evenly balanced. What tips the scales is consideration of more personal factors and the surrounding context of the discussions and negotiations that had been going on about where the consultation should take place, if at all. If only the claimant's own circumstances are to be looked at, there seems no doubt that he was incapable of getting to the Islington centre if left entirely on his own to do so. Nor do I consider that he was capable of organising the assistance of others if the initiative had to come from him. If the claimant and his appointee are to be considered together, I consider that the impression from the communications with the DWP that the appointment of 16 June 2016 was not the last word on what form of consultation was to be required and the appointee's genuine (and in my opinion reasonable) belief that it would harm the claimant's health to force him to attend the consultation against his wishes are powerful factors indicating a good reason for the claimant's failure to attend. Whichever is the proper approach, those more personal factors, in the context of dubious suitability, indicate that there was a good reason for the claimant's failure to attend.

35. Accordingly, no negative determination can be made under regulation 9(2) of the PIP Regulations and the disallowance of entitlement to PIP in the decision of 22 July 2016 cannot stand. The Secretary of State's written submission to the First tier asked the tribunal, if it accepted good reason, to direct the claimant to attend an assessment (meaning a consultation). That in my judgment was not within the powers of the First-tier Tribunal. As explained in paragraph 18 above, a requirement under regulation 9 can only be imposed by the Secretary of State or by an approved person or by an organisation with which such a person is associated for the purpose of carrying out consultations. And the requirement must specify the time, date and place of the consultation, which a tribunal could not specify even if it had power to do so. Plainly I am in no position to substitute a decision awarding PIP, because there has been no fair opportunity to put forward evidence about the satisfaction or otherwise of the main conditions of entitlement in sections 78 and 79 of the Welfare Reform Act 2012. Thus, the only alternative is to set aside the decision of 22 July 2016. That leaves the Secretary of State to determine the outstanding claim for PIP, in the course of which he will, amongst other things, have to consider whether to put the case into the consultation process or not.

36. My decision giving effect to those conclusions is set out at the beginning of this document. The setting aside of the decision of 22 July 2016 necessarily involves setting aside the negative determination embodied in it.

The effect on the claimant's award of DLA

37. Since the decision disallowing entitlement to PIP has been set aside, the basis for the application of regulation 13(1)(a) of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (see paragraph 10 above) falls away, because there is no longer a negative determination under regulation 9(2) of the PIP Regulations in existence. It is perfectly clear from the terms of the notification letter of 22 July 2016 that the Secretary of State's decision covered both PIP entitlement and the termination of entitlement to DLA. The claimant's appeal against that decision must therefore be regarded as covering both those aspects of the decision. Accordingly,

my substituted decision sets aside the termination of entitlement to DLA after 9 August 2016. Payment of the amount due under the existing of award of DLA from 10 August 2016 onwards must now be made unless and until either that award terminates under its own terms or is brought to an end by supersession, a PIP assessment determination is made (regulation 17 of the Transitional Regulations), another negative determination is made or there is a failure to comply with some other requirements (regulation 13(1)).

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 23 November 2017