Upper Tribunal for Scotland

2024UT63
Ref: UTS/AS/23/0970
Ref: UTS/AS/24/0022
Ref: UTS/AS/24/0025
Ref: UTS/AS/24/0030

DECISION OF

Lady Carmichael

ON THE APPEALS
IN THE CASES OF

Social Security Scotland

Appellant

- and -

AH

Respondent

Social Security Scotland

Appellant

- and -

AS

Respondent

Upper Tribunal for Scotland

Social Security Scotland

Appellant

- and -

SS

Respondent

Social Security Scotland

Appellant

- and -

GA

Respondent

FTS Case reference: FTS/SSC/AE/23/00065
FTS Case Reference - FTS/SSC/AE/23/00675
FTS Case reference: FTS/SSC/AE/23/00644
FTS Case reference: FTS/SSC/AE/23/00789

Representation:

Social Security: Mr Iain Halliday, Advocate; Anderson Strathern
AH: Ms Jacqui MacLeod, Welfare Rights Officer, Coatbridge Citizens' Advice Bureau
AS: Ms Judith Hodson, East Lothian Council Welfare Rights
SS: Party
GA: Ms Judith Hodson, East Lothian Council Welfare Rights

30 October 2024

Decision

The appeal in each case is allowed. The decision of the First-tier Tribunal for Scotland ("FTS") in each case is quashed so far as relating to activity 1 of the mobility component. Each case is remitted to the FTS for a new hearing of the ADP appeal, confined to the question of entitlement in relation to activity 1 of the mobility component. The FTS may, but need not, be differently constituted from the panel that heard the original appeal in each case.

Introduction

1. These cases all involve claims made under the Disability Assistance for Working Age People (Scotland) regulations ("the 2022 regulations" or "the ADP regulations"). In each case the FTS found that the claimant scored 10 points in respect of mobility activity 1 in relation to descriptor d.

2. Social Security Scotland appeals in relation to that finding. It relies on a decision by the Upper Tribunal relating to the interpretation of the Social Security (Personal Independence Payments) regulations 2013 ("the 2013 regulations" or "the): *MH* v *Secretary of State for Work and Pensions* [2016] UKUT 0531 (AAC), [2018] AACR 12. It argues that the FTS should have interpreted the 2022 regulations in the same way that the Upper Tribunal interpreted the 2013 regulations.

The regulations

3. The 2022 regulations make provision for entitlement to adult disability payment ("ADP"). ADP has two components: the daily living component, and the mobility component. These appeals relate to the mobility component. A score of at least 12 points entitles a person to payment of the mobility component at the enhanced rate. A score of at least 8 points entitles a person to payment of it at the standard rate: r6(2),(3) and r9(3)(a),(b)). Where a person satisfies more than one of the descriptors in Part 3 of Schedule 1 it is the descriptor with the highest score which applies: r10(1)(b)). A person's ability to carry out an activity is to be assessed by determining whether they can carry out the activity safely, to an acceptable standard, repeatedly, and within a reasonable time period: r7(2)(b)).

4. Mobility activity 1 is "Planning and following journey", and provision for the allocation of points is made in Part 3 of Schedule 1:

Column 1 *Activity*	*Column 2* *Descriptor*	*Column 3* *Points*
1. Planning and following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs the prompting of another person to be able to undertake any journey to avoid overwhelming psychological distress to the individual.	4
	c. Cannot plan the route of a journey	8
	d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the individual.	10
	f. Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12

5. Part 3 of Schedule 1 to the 2013 regulations is in identical terms, save for descriptors b. and e. Descriptor b. reads:

   "b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant."

   In descriptor e. the word "claimant" appears rather than "individual".

The decision in *MH*

6. A three-judge panel was convened to consider a number of conflicting decisions by single judges of the Upper Tribunal regarding the construction of Part 3 of Schedule 1 to the 2013 regulations: *DA v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 344 (AAC); *RC v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 386

(AAC); *HL v Secretary of State for Work and Pensions* [2015] UKUT 694 (AAC). Those decisions dealt in particular with the construction of descriptors d. and f., and whether the phrase "follow the route" was concerned only with the ability to navigate. The panel did not accept that the phrase was limited to the ability to navigate. The panel also rejected the proposition that descriptors d. and f. related only to sensory impairments, and could not be satisfied where a person was experiencing overwhelming psychological distress. Mere anxiety would not be sufficient, and descriptors d. and f., where psychological distress was in issue, required to be read in the context of all the descriptors relating to the activity, and consistently with descriptors b. and e. Only if a claimant was suffering from overwhelming psychological distress would anxiety be a cause of the claimant being unable to follow the route of a journey.

7. The following are the relevant passages in the reasoning of the panel.

"35. We are not persuaded that the different terminology in descriptors 1b and 1e on the one hand and descriptors 1d and 1f on the other hand is by itself significant and indicates that they are concerned with mutually exclusive issues so that overwhelming psychological distress is relevant only to descriptors 1b and 1e and not also to descriptors 1d and 1f… It seems to us that different language was required simply because descriptors 1d and 1f are clearly intended to apply to, amongst others, those who are visually impaired and so have difficulty navigating, whereas descriptors 1b and 1e clearly apply only to those liable to suffer from overwhelming psychological distress if they go outside unaccompanied or at all…

36. The phrase "follow the route", when given its natural or ordinary meaning, clearly includes an ability to navigate but we do not consider that it is limited to that. Navigation connotes finding one's way along a route, whereas "follow a route" can connote making one's way along a route or, to use one of Ms Scolding's dictionary definitions, "to go along a route" which involves more than just navigation.

44. Reading descriptors 1d and 1f in isolation, we consider that the Secretary of State was right to concede in HL that overwhelming psychological distress can have the effect that a person is unable to follow the route of a journey because he or she may be or become unable to navigate or, we would add, to make progress. A person who is accompanied may be encouraged to overcome the distress whereas a person who is unaccompanied may not. Thus descriptors 1d and 1f might be satisfied by a person liable to suffer from overwhelming psychological distress when out walking. There is therefore a potential overlap between descriptor 1b on one hand and descriptors 1d and 1f on the other hand…

48. In cases where claimants suffer from severe anxiety, descriptors 1d and 1f must be applied in the light of descriptors 1b and 1e with due regard being had to the use of the term "overwhelming psychological distress". Only if a claimant is suffering from overwhelming psychological distress will anxiety be a cause of the claimant being unable to follow the route of a journey. Although regulation 4(2A) applies so that the question is whether, if unaccompanied, the claimant can follow a route safely, to an acceptable standard, repeatedly and within a reasonable time period, the fact that a claimant suffers psychological distress that is less than overwhelming does not mean that the claimant is not following the route safely and to an acceptable standard. The threshold is a very high one. Thus, the facts that the claimant was "anxious" and "worried" in DA and was "emotional" in HL were not sufficient for those claimants to satisfy the terms of descriptors 1d or 1f because they could in fact complete journeys unaccompanied without being overwhelmed".

Developments after the decision in *MH*

8. The Social Security (Personal Independence Payment) (Amendment) Regulations 2017 amended the 2013 regulations by changing descriptors c. d. and f. relating to mobility activity 1 so that each was prefaced by the words, "For reasons other than psychological distress". The effect of the amendment would have been to reverse the effect of *MH*. The provision making the amendment was found to be unlawful, and quashed: *RF v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin).

9. The Upper Tribunal provided further guidance about the construction of descriptors d. and f. in mobility activity 1 in *H O'H v SSWP (PIP)* [2020] UKUT 135 (AAC) at paragraphs 38 and 39:

"38. […] There is nothing in *MH* (or the three previous decisions of single judges that were considered) which would suggest that a purely physical problem in getting from A to B gives rise to entitlement under descriptor 1d.

39. The point can also be put this way. If the Appellant's submission on the construction of mobility activity 1 holds good, it does not simply mean that he qualifies for 10 points under descriptor 1d, on the basis that he "cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid". By the same logic, he should rather score 12 points for descriptor 1f on the basis that he "cannot follow the route of a familiar journey without another person, assistance dog or orientation aid". His contention, after all, was that he could not access public transport e.g. by reference to a

local bus stop or railway station, which involve (very) familiar routes. The only point of difference between descriptors 1d and 1f is whether the route involves a familiar or unfamiliar journey. That distinction must be there for a purpose: words matter, especially in legislation. The semantic difference between descriptors 1d and 1f makes perfect sense in the case of a claimant with a cognitive or mental health impairment – the claimant who cannot manage to follow a familiar route is more disabled than the one who can manage familiar routes but cannot follow the route of an unfamiliar journey. But if the disabling condition is a physical restriction on progressing on foot (to stand and to move), then the familiarity or otherwise of the route becomes a distinction without a difference."

The decisions of the FTS

AH

10. The FTS found that AH had sciatica, irritable bowel syndrome, and rectal prolapse. His main symptoms were back and leg pain, numbness in his right arm, stomach pain, nausea, drowsiness, headaches, tiredness, constipation, heartburn, dizziness, rectal pain and rectal bleeding. The FTS considered the evidence regarding activity 1 and expressed its conclusions in paragraphs 35 to 38 of its decision:

"35. On activity 1, Planning and following journeys, the respondent argues that descriptor a applies, meaning that the appellant scores 0 points for this activity. We conclude that descriptor d is applicable here, entitling the appellant to 10 points.

36. The evidence from the appellant (both in his representations prior to the hearing as evidenced in the case file, and supported by his oral evidence at the hearing) is clear: he needs someone else to be with him in order to follow the route of an unfamiliar journey. In his oral evidence, the appellant corrected the information in the case file on his drives to and from school: he does this once per month, as a result of pressure from his children to do this, not at least once per week as was noted previously by the respondent.

37. When asked if he would drive on his own to a place he had not been before, the appellant responded that he would not do that, since it would bring anxiety, distress, depression and pain. He also stated that if his wife went with him, he might be able to manage this task. The appellant also reported that when he goes somewhere unfamiliar he will panic as all he thinks about is the toilet. He described his feeling of panic as causing increased heart rate, headache and sweating (see the Case Discussion Information note of 23 January 2023 in the case file at page 182, under 'Question 3'). This is not disputed by the respondent, but they argue that toilet needs or incontinence are not

relevant to this activity and instead are to be considered under daily living activity 5. We do not agree. Descriptor d under Mobility Activity 1 does not restrict the reason for being unable to follow the route of an unfamiliar journey. Had the framers of the legislation wished to do so, that could have been done easily. Indeed, in descriptor e within the same activity, that is exactly what the legislative drafters have done: that descriptor applies only where undertaking the journey would cause 'overwhelming psychological distress' to the appellant. In any event, it is not the appellant's toileting needs or incontinence that causes the difficulty – it is the appellant's pre-occupation with the toilet that causes it. Daily living activity 5 is about physically managing toileting or incontinence, not managing a genuine fear that happens to be related to toileting.

38. We conclude that the appellant is unable to 'follow the route of an unfamiliar journey' (as that phrase is defined in Part 1 of Schedule 1 to the regulations) when viewed in the context of the need to consider whether the appellant can carry out the activity 'to an acceptable standard' (regulation 7(2)(b)(ii)). That term refers to a 'reasonable standard for the activity, taking account of the impact on the individual of carrying out the activity to that standard' (regulation 7(3)(b)). The impact on the appellant would be a feeling of panic, as described above. A person cannot be said to be able to undertake an unfamiliar journey to a reasonable standard if in doing so, they would experience a feeling of panic, involving an increased heart rate, headache and sweating."

AS

11. The relevant passages in the decision of the FTS are in the following terms:

"6. The appellant suffers from Chronic Obstructive Pulmonary Disease ('COPD'), depression and anxiety and a lateral hip pain condition. The appellant takes painkilling medication as well as medication for her mental health.

…

12. When going to work or to medical appointments, the appellant is taken there by car, usually by her brother in law. Once she comes home from a trip, the appellant does not go back out again. The appellant is not able to take a journey on her own. To do so would cause her to feel anxious and uptight and cause her to physically shake.

…

33. On mobility activity 1, (Planning and following journeys), taking account of the definition of the term 'follow the route of a journey' in Schedule 1 of the regulations, alongside the findings in fact at paragraphs 6 and 12 above, we conclude that in order to follow the route of an unfamiliar journey, the appellant would require the assistance of someone else. Following the route of a journey involves both navigating and making

one's way along a planned route to a planned destination. We conclude that the appellant would not be able to do this on her own – she would simply refuse to embark on the journey. We were not persuaded that this would be the case with a familiar route (descriptor f.), especially when one considers the required period condition and the 50% of days rule, given that the appellant made her way to work prior to moving in with her sister. In any event, the award for this component would be the same whether descriptor d. or f. applies, given our decision on mobility activity 2 (below)."

SS

12. SS has incontinence of the bladder and bowel, and also anxiety and depression. The FTS found:

"20. In relation to mobility activity 1, planning and following journeys, in their application the appellant stated that she never needs help to work out how to get somewhere new. However, she advises that she does not go anywhere new due to levels of anxiety she feels in case of an accident and being unable to reach a toilet. She is able to go to her work as this is a familiar place. Her evidence today was that she does not make journeys to new places unless she is accompanied by a family member. If she was not accompanied she would feel very significant anxiety, She would not sleep. She made a visit to see her son in America because he was ill, but the journey caused her terrible anxiety. She could not speak to other passengers. She would not make the journey again. She feels the experience has left her more anxious. In relation to this activity, she cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid. She can, however, manage familiar journeys and regularly makes familiar journeys to her work alone."

GA

13. The FTS found that GA had functional neurological disorder which caused left-sided weakness and some visual and spatial awareness symptoms. She also had some functional cognitive symptoms. The FTS considered mobility activity 1 at paragraph 25 of its decision.

"25. In relation to mobility descriptor 1 (planning and following a journey), the Tribunal heard evidence from the appellant that she took the bus to and from work. Her colleagues were regularly on the bus on these journeys. The appellant gave evidence that she struggled with traveling to unfamiliar places, and experienced anxiety and panic when going to unfamiliar places alone. The presenting officer for the respondent who was in attendance at the hearing invited the Tribunal to award mobility descriptor 1(b) at conclusion of the evidence. The Tribunal decided that, from the evidence heard in particular during the Tribunal, the appellant could carry out journeys without prompting.

She was able to, for example, travel to work by bus twice weekly. From the evidence the Tribunal decided that the appellant was unable to follow the route of an unfamiliar journey without someone with her. They awarded mobility descriptor 1(d). This carries an award of 10 points."

The relevance of MH to construction of the 2022 regulations

14. It was common ground that the FTS was not bound by the decision in *MH*. There is, however, a presumption that Parliament makes law in the knowledge of, and having regard to, relevant judicial decisions: *Barras* v *Aberdeen Steam Trawling and Fishing Co Ltd* 1933 SC (HL) 21, at 27:

> "It has long been a well-established principle to be applied in the consideration of Acts of Parliament that, where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

15. In the absence of material to rebut the presumption just referred to, the legislator must be taken to have intended that descriptor d. in the 2022 regulations be interpreted in accordance with the decision in *MH*.

16. The 2022 regulations are not identical to the 2013 regulations. The criteria for people living with a terminal illness are more broadly drawn. There is an entitlement to short term assistance under the 2022 regulations which does not exist in the 2013 regulations. Some definitions are not identical: compare, for example, the definition of "safely" in regulation 7(3) of the 2022 regulations with that in regulation 4(4) of the 2013 regulations. That appears to be intended to reflect the decision in *RJ, GMcL and CS* v *Secretary of State for Work and Pensions* (PIP) [2017] UKUT 105 (AAC), [2017] AACR 32.

17. There are two differences in the words used in the schedule dealing with mobility activity 1 as between the 2013 regulations and the 2022 regulations. These are in descriptor b., where the words "of another person" appear in the 2022 regulations, but not the 2012 regulations; and in descriptor e., where the 2022 regulations refer to "the individual" rather than "the claimant". Neither of these differences is obviously relevant to the construction of descriptor d.

18. As I have just noted, there are differences between the two sets of regulations. They reflect some differences of policy, as in relation people living with a terminal illness. The 2022 regulations appear to incorporate some material from judicial decisions as to the proper construction of the PIP regulations (as in relation to "safely"), but there has not been a wholesale attempt to codify judicial decisions about those regulations by any more extensive rewriting of the eligibility criteria. Ms Hodson placed some weight on the differences between the two sets of regulations. She submitted that where the criteria had not been amended to incorporate judicial interpretation of the 2013 regulations I should infer a positive intention to reject that construction. While I acknowledge that the approach of the Scottish Government to drafting has not been entirely consistent so far as the incorporation or codification of PIP caselaw is concerned, it is clear that the words of mobility activity 1 descriptor d. in the 2022 regulations are identical to those in the same context in the 2013 regulations. There is no proper basis to depart from the principle of interpretation that those words should be given the same interpretation as they have been in the caselaw regarding the 2013 regulations, and in particular *MH.*

19. It follows that the FTS erred in law in failing to construe descriptor d. in the way in which it was construed in *MH*.

20. I have reached that conclusion without reference to the pre-legislative material on which counsel relied. I record, however, that there is nothing in that material that runs counter to that conclusion. On the contrary, the material tends to support the view that it was intended that there be no material change in the eligibility criteria as between PIP and ADP. Among the reasons for that were the transfer of existing PIP claimants to ADP without reassessment, and the effect of a PIP award in providing a "passport" to other reserved benefits. I summarise the material below.

The pre-legislative material

21. Counsel submitted that the material demonstrated that it was intended that claimants should retain the rights that they had under the 2013 regulations, and that there should be no material change in eligibility criteria so far as mobility activity 1 was concerned.

22. The Cabinet Secretary received written advice from the Disability and Carers Benefits Expert Advisory Group ("DACBEAG"). The group's PIP Caselaw and disability assistance for working age people ("DAWAP") Working Group advised her on 12 March 2020. Their recommendations were that regulations should be drafted "to reflect individuals' rights as established in PIP caselaw", and that the Scottish Government "should consider the findings of DACBEAG's independent short-life working group of

disability benefit experts, which will consider how best to reflect the rights established in PIP caselaw in DAWAP regulations". The advice contained the following passage, at page 1:

> "We stress that this advice forms only what we were able to develop in the short timeframe available to us and is therefore not comprehensive. We therefore recommend this advice serves to begin a longer, more comprehensive, look into all the principles developed in PIP caselaw and how they might be integrated into DAWAP regulations.
>
> We recognise that including all principles of PIP caselaw will be overly cumbersome, but believe a balance can be struck that ensures the DAWAP regulations provide clarity and that individuals in Scotland retain the rights they currently have."

The group was concerned that simply copying the PIP regulations would give rise to a risk that Scottish tribunals would not construe the regulations in the same way as the United Kingdom tribunals had, with the result that individuals in Scotland might be treated differently from claimants elsewhere in the United Kingdom at the point of transfer. It suggested that various matters that had been the subject of determination by the Upper Tribunal might be the subject of express provision in the interpretation section of the Scottish regulations. At page 12 of the advice the group referred to the decision in *MH*.

23. The Cabinet Secretary responded to the group on 17 July 2020. In relation to mobility activity 1, she wrote:

> "Given the considerable caselaw relating to this activity I agree the interpretations you have highlighted should be developed in the DAWAP regulations to ensure the descriptors are applied as intended."

24. The Scottish Commission on Social Security produced a scrutiny report on the draft regulations, which it submitted to the Scottish Government and to the Scottish Parliament's Social Justice and Social Security Committee on 1 October 2021. It recorded some differences between the draft regulations and the 2013 regulations. One of the more significant differences was in the approach to people living with terminal illness: paragraph 4.1. To qualify for PIP a person had to have a progressive disease and be expected to die within six months. The draft regulations placed no time limit on life expectancy. After the Scottish Government announced its intention to approach

matters in that way, the High Court of Northern Ireland found that the six month time limit was unlawfully discriminatory, a decision reversed by the Court of Appeal in Northern Ireland.

25. At least at the point of transition from PIP to ADP the Commission noted that the two would differ in matters of process rather than eligibility criteria or rates of payment. There was to be a review of disability assistance in 2023: page 11. At paragraph 6.1 The Commission recorded:

> "… the Scottish Government has said that a safe and secure transition to ADP requires the eligibility rules for ADP to be broadly the same as PIP during the period of transition. ADP marks a step-change in the scale of delivery to be undertaken by Social Security Scotland. The task of setting up the systems needed and transferring a large existing caseload of over 300,000 should not be underestimated. Caseload predictions on which the resources for Social Security Scotland to deliver ADP rest, are based on the PIP caseload. The possibility of wider eligibility criteria generating a lot of new claims could render the task overwhelming. Furthermore, it is planned to transfer an estimated 6,000 awards a month from PIP to ADP without reconsidering entitlement in the majority of cases. Having to decide entitlement against new rules could again overwhelm the system.
>
> Regardless of any other factors, these challenges alone simply do not permit going further in changing the rules at this stage. The Commission accepts that this is the reality. The Commission is in no doubt that a stable, well-run system that gives people confidence in the continuity of their payments is absolutely critical. We are persuaded that changing eligibility criteria at this time would risk undermining the delivery of ADP, with extremely detrimental consequences for people who depend on it.
>
> However, delivery challenges are not the only constraints on making more substantial changes. Others include the interdependency with the reserved benefits system and the need to protect the passporting of entitlement to other benefits and services, and cost. We say more on his below, as some may continue to apply to the 2023 review and potentially always, to some degree."

26. At paragraph 6.2, under the heading "Passporting", the commission noted:

> "Rates of ADP daily living and mobility components act as passports to other forms of assistance, for example, additional amounts in means-tested benefits, Carer's Allowance, getting a car through the Motability scheme, and reductions and exemptions from Vehicle Excise Duty. Some of these are reserved to the UK and some devolved to the Scottish Government. There are also passports to local authority and other forms of provision, such as council tax exemption, Blue Badge, bus passes, and Disabled Person's Railcard. For ADP to give people entitlement to UK benefit amounts and support in the same way as PIP, the DWP must accept ADP as a 'like for like' system. So far, that agreement has been achieved by keeping the eligibility rules broadly the same. There may come a point where ADP and PIP have diverged to the extent that an alternative to automatic passporting from ADP to UK benefits must be considered. The risk could be that increased disability benefit could be offset by loss of passported benefits, leaving recipients worse off."

27. The Commission wrote this:

> "Through appeals brought by individual claimants, tribunals and courts interpret social security regulations. These decisions form part of the law, and are referred to as 'case law'. Decision makers must follow case law as well as the regulations when deciding entitlement in other cases. There are hundreds of PIP cases interpreting the PIP regulations, some setting important principles relating to eligibility criteria. Eligibility criteria are largely replicated in the draft ADP regulations but despite the similarity, PIP case law does not automatically form part of ADP law. Tribunals and courts in Scotland, who will in time consider individual ADP appeals, will decide to what extent they should follow PIP case law when interpreting ADP regulations. However, the Scottish Government has chosen to incorporate some principles from case law in the draft ADP regulations. This has the effect of clarifying the law in certain definitions of terms and certain eligibility rules. The intention is to reflect other case law in guidance for Social Security Scotland decision makers. SCoSS believes that this is the right approach. It gives more rights to individuals – if a particular interpretation is in the regulations and the decision maker does not follow the law, an individual can put that right at appeal."

Some parts of that passage do not reflect the presumption already referred to that legislation takes place against the background of, and in the knowledge of, existing caselaw. The Commission cautioned against a proposed change in the draft regulations (not ultimately adopted) to the wording of mobility activity 1, descriptor e., because it

might have the unintended effect of narrowing the eligibility criteria: page 33. The Commission made no particular recommendations so far as descriptor d. was concerned.

28. The draft regulations were considered by the Social Justice and Social Security Committee on 27 January 2022. The Minister stated that the rules for ADP would be broadly the same as those for PIP during "the transition period": Col 5. He referred to need for those being transferred from one benefit to the other to receive the same amounts and be subject to the same criteria for assessment: Col 9.

These appeals

29. I have considered in each case whether the findings of the FTS are of a nature such as to permit me to re-make the decision. One of the purposes of hearing four appeals together was with a view to trying to identify whether there might be cases in which the findings of the tribunal were capable of supporting the conclusion that a particular descriptor applied. It is clear in each of these cases that the FTS did not construe descriptor d. of mobility activity 1 in the light of the relevant caselaw from the Upper Tribunal regarding the descriptors in the 2013 regulations. That error is obviously material in each case. It is not possible to figure what the FTS would have found had it directed itself correctly in law.

30. It is therefore necessary to remit each case for a new hearing. There is no criticism made of any other aspect of the decision of the FTS in any of these cases. Social Security Scotland accepted that any quashing and remittal should be confined to the decision of the FTS on the point of law arising as to the construction of the descriptors in mobility activity 1. I have therefore quashed only that part of each decision which is properly regarded as a decision based on the point of law focused in these appeals.

31. Each panel of the FTS misdirected itself in law. There is, however, nothing to indicate that the original panel in each case would be unable to put aside its earlier view of the law, and apply the law in accordance with this decision to the evidence, including any new evidence, in each case. Factors relevant to whether a matter can be remitted to the same tribunal include the following:

    (a) proportionality;

    (b) passage of time;

    (c) bias or partiality;

(d) whether the original decision was totally flawed, or completely mishandled, so that the appellate tribunal cannot have confidence that, with guidance, the tribunal can get it right on remittal;

(e) whether there will be a risk of the appearance pre-judgment or bias on remittal.

All of those factors must be looked at in the balance with tribunal professionalism. The appellate tribunal will ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the first instance tribunal is capable of a professional approach to dealing with the matter on remittal. Where a tribunal is corrected on an honest misunderstanding of the law not amounting to a totally flawed approach, and it does not appear that the tribunal has so thoroughly committed itself that a rethink appears impracticable, it can be presumed that it will deal with the remitted appeal in a professional way, paying careful attention to the guidance given to it by the appellate tribunal: *Sinclair Roche & Temperley and others* v *Heard and others*, Employment Appeal Tribunal, [2004] IRLR 736, 22 July 2004, at paragraph 46, cited with approval in *Burrell* v *Micheldever Tyre Services Ltd* [2014] ICR 935, at paragraph 20; see also *Secretary of State for the Home Department* v *AF* (No 2) [2008] 1 WLR 2528 at paragraphs 55-57. I do not know whether it would be practical or efficient to convene the same panel in each case, which is why I have directed that the remittal may be, but need not be, to a different panel.

DIRECTIONS

1. The new hearing may, but need not be, by a differently constituted tribunal.
2. That hearing should be confined to entitlement in relation to activity 1 of the mobility component.
3. The FTS should consider seeking from parties, in advance of the hearing, any further evidence parties wish to submit in relation to that matter.
4. The FTS should make clear findings in fact directed to such of the descriptors relative to activity 1 of the mobility component as the FTS considers is satisfied in each case, having regard to the relevant law as set out in this decision.

Lady Carmichael
Member of the Upper Tribunal for Scotland
30 October 2024

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*