



**DECISION OF**

Lady Carmichael

**ON AN APPLICATION FOR PERMISSION TO APPEAL  
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)  
IN THE CASE OF**

DB  
per Toryglen Law and Money Advice Centre,

Applicant

- and -

Social Security Scotland  
per Anderson Strathern

Respondent

FTS Case reference: FTS/SSC/AE/23/00207

29 April 2024

**Decision**

The Tribunal refuses permission to appeal against the determination of the First-tier Tribunal (“FTS”) dated 19 September 2023 on grounds of appeal (1) and (3), ground (2) not being insisted upon. The appeal will proceed only on the grounds on which the FTS granted permission.

**Introduction**

1. This is an application for permission to appeal.
2. On 29 September 2022 the respondent determined that the applicant was entitled to the standard daily living component of Adult Disability Payment (“ADP”) but

was not entitled to the mobility activities component. The relevant regulations are the Disability Assistance for Working Age People (Scotland) Regulations 2022, SSI 2022/54 (the ADP regulations). The provisions relating to scoring for daily living activities (DLA) are in regulations 7 and 8 and Part 2 of Schedule 1.

3. On first determination the decision-maker awarded a total of eleven points. That meant that the applicant was regarded as having a limited ability to carry out DLA. He was entitled to the daily living component at the standard rate in terms of regulation 5(2). The applicant received:
  - a) two points for activity 1 descriptor (b) (needs to use an aid or appliance to be able to either prepare or cook a simple meal);
  - b) two points for activity 2 descriptor (b) (needs (i) to use an aid or appliance to be able to take nutrition, or (ii) supervision to be able to take nutrition, or (iii) assistance to be able to cut up food);
  - c) one point for activity 3 descriptor (b) (needs any one or more of the following (i) to use an aid or appliance to be able to manage medication, (ii) supervision, prompting or assistance to be able to manage medication, (iii) supervision, prompting or assistance to be able to monitor a health condition);
  - d) two points for activity 4 descriptor (c) (needs supervision or prompting to be able to wash or bathe);
  - e) two points for activity 6 descriptor (c) (needs either (i) prompting to be able to dress, undress or determine appropriate circumstances for remaining clothed, or (ii) prompting or assistance to be able to select appropriate clothing);
  - f) and two points for activity 9 descriptor (b) (needs prompting to be able to engage socially with other people).
4. On redetermination the decision-maker removed the two points for activity 9(b) but added two points for activity 10 descriptor (b) (needs prompting or assistance to be able to make complex budgeting decisions).
5. The applicant appealed to the FTS. He asked the FTS to reinstate the points for activity 9(b). If he had succeeded, he would have been entitled to ADP at the enhanced rate: regulations 5(3), 8(3)(b). The FTS decided that the applicant was

not entitled to any points for any activity. At the start of the hearing the respondents' representative agreed with the applicant's position. After evidence was heard, the respondent's representative changed their position and submitted that the applicant was not entitled to the enhanced rate.

6. The applicant sought permission to appeal on three grounds, but at the hearing did not insist in the second of those. The remaining grounds were these

"1. Treatment of ADHD Assessment Report dated 4 January 2022

- (a) It is submitted that the Tribunal failed to take into consideration the reported difficulties with communication mentioned in that report at page (17) of the papers. It specifically reported that he could become angry or upset quickly, it is submitted that such evidence is relevant to whether or not descriptor 9(d) would apply. By failing to take that part of the report into account the Tribunal have erred in law.
- (b) The Tribunal have failed to make sufficient findings on the amount of time it took the Applicant to perform relevant activities. Reference is made to page (17) of the papers and the report referred to above where it stated "They are very easily distracted and would spend all day thinking about doing a task but not getting round to do it. They will always start tasks and not complete them. They will flit from one activity to another but become easily confused and overwhelmed." It is submitted that this would suggest that the Applicant is unable to carry out activities within a reasonable time period as defined in Regulation (7) of the Disability Assistance for Working Age People (Scotland) Regulations 2022. It is submitted that by failing to take into account this part of the report, and by failing to make adequate findings on how long it would take the Applicant to complete activities, the Tribunal have erred in law.
- (c) In the report at page (17) of the papers it is stated "'DB' is very forgetful and will also forget to eat." It is submitted that the Tribunal failed to take this into consideration, failing which they have failed to give reasons for rejecting this and accordingly have erred in law.
- (d) The Tribunal have also failed to take into account the difficulties that he had in pursuing his academic studies and accordingly have erred in law.

### 3. Difficulties in Maintaining Employment

- (a) The Tribunal refer to the Applicant's employment history. However they failed to take into account the fact that he had been unable to hold jobs for any significant amount of time, and accordingly have erred in law.
- (b) At paragraph (21) of their Statement of Reasons the Tribunal refer to the Applicant doing bar work. It is submitted however that any interaction during the course of work would not be of a level that would amount to establishing relationships as defined in Schedule 1 of the Regulations.

Accordingly the Tribunal have erred in law."

- 7. The FTS issued a decision on permission on 15 November 2023. The FTS rejected each of the grounds of appeal on the basis that none of the matters raised in the grounds was a point of law. Notwithstanding that, the FTS granted permission to appeal. It identified of its own motion a number of points of law. It described these as "questions" and set them out as follows:

"(a) Question – Whether the FTS erred in law when the FTS did not accept the consensus reached by the applicant and the respondent that EDL was appropriate and went on to decide for itself what, if any award was correct? That is, in effect, that the tribunal, being an inquisitorial tribunal, was entitled to hold the views of the respondent to be relevant but not determinative.

(b) Question – Whether the FTS erred in law when, in the absence of a second redetermination, it decided that the FTS and only the FTS was entitled to make a decision?

(c) Question – Whether the FTS erred in law when, in the absence of a second redetermination, it decided that the appeal became a matter for the FTS alone, when the appeal was marked?

(d) Question – Esto, the appeal did not become a matter for the FTS alone when the appeal was marked, whether the FTS erred in law in deciding that the appeal became a matter for the FTS alone when the parties appeared before the FTS on the day and after the first question was asked?"

The applicant then applied to this tribunal for permission to appeal on the three grounds he had advanced to the FTS. I set a hearing to deal with that application. I also invited submissions as how the decision on permission to appeal by the FTS ought to be construed and as to its effect.

### **Submissions of parties**

8. In relation to the questions identified by the FTS in its decision on permission, the applicant submitted that they focused arguable contentions that the FTS had erred in law in proceeding to hear the appeal. I refer in more detail to his submission on that point at paragraphs 20 and 21.
9. The applicant indicated that he was not insisting on his second ground of appeal, which related to the attendance of an advocacy worker. His submission in relation to his first and third grounds focused particularly on a failure on the part of the tribunal to give reasons.
10. The respondent's primary position was that the decision of the FTS granting permission did not state any point of law on which permission to appeal could properly be granted. Permission to appeal had not been properly granted. The Upper Tribunal should refuse permission on the grounds presented to it, and also decline to allow the appeal to proceed on the basis that the FTS had not properly granted permission to appeal.
11. The respondent accepted that permission might be granted on a point of law not identified by parties. It was, however, unclear on what basis the FTS had purported to grant permission. They had not expressly identified any arguable, material point of law upon which to base the grant of permission. The respondent suggested, as a fall-back position, that I might refer the matter back to the FTS under rule 8(3)(o) of the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018. That rule provides that the Upper Tribunal may require the FTS "to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before the [FTS]".

12. So far as the grounds presented to this tribunal were concerned, they were without merit. The FTS did not require to refer to every piece of information before it, and its findings were sufficient to support the disposal of the appeal.

## **Decision**

### **The grant of permission by the FTS**

13. I decline to ask the FTS to provide further reasons for its decision on permission.
14. Requests for reasons for a decision in the context of rule 8(3)(o) will normally relate to the substantive decision of the FTS, rather than its decision on permission. The Upper Tribunal does not have jurisdiction to review or change a grant of permission by the FTS. There would be no purpose in asking for reasons from the FTS in relation to a refusal of permission, because the Upper Tribunal has jurisdiction to consider permission of new where the FTS has refused permission.
15. It will normally be for the Upper Tribunal to construe the decision on permission from the FTS. I am in any event satisfied that it can do so in this case without seeking any additional information about the proceedings before the FTS. That is likely to assist in avoiding delay in the proceedings in accordance with the overriding objective.
16. In approaching an application for permission to appeal a tribunal must consider whether a ground of appeal, whether one advanced by a party or one identified by the tribunal of its own motion, gives rise to an arguable, material point of law. With that in mind it will often be helpful explicitly to address that test in written decisions relating to permission. The fact that the FTS in this case did not do so in relation to the questions identified by it does not mean, however, that the grant of permission is invalid or without effect.
17. As I have indicated, the Upper Tribunal does not exercise an appellate or review jurisdiction in relation to a decision of the FTS granting leave, and I do not have jurisdiction to prevent the appeal from proceeding on the grounds on which the FTS granted leave.

18. The four questions identified by the FTS all relate to whether the FTS erred in law in proceeding to hear evidence and decide the appeal in circumstances where at the start of the hearing the respondent did not oppose the appeal. That is the question of law that underlies each of the questions, and it is to that question that parties will have to address submissions in the appeal.
19. The applicant has submitted that the reference by the FTS in its “questions” to a second redetermination is misplaced, because Social Security Scotland (SSS), unlike the Department of Work and Pensions, does not have power to remake a decision even after reconsideration and when an appeal has been lodged.
20. The applicant has also submitted that it may have been open to SSS, if agreeing with the position of the applicant, to make a new determination by virtue of regulation 48 of the ADP regulations, and in that context the FTS should not have proceeded with the appeal. The applicant submits in the alternative that the FTS should not have proceeded where there was a concession by the SSS, as doing so was contrary to the overriding objective in the rules governing its procedure, and that the FTS should have exercised its discretion to adjourn to allow SSS to make a new determination under regulation 48. It will be open to the applicant to make these arguments in the appeal proceeding on the grounds in respect of which the FTS granted permission.

### **The application for permission to the Upper Tribunal**

21. The decision of the FTS is not a model of clarity. The section headed “Facts/reasons” contains a mixture of findings in fact and short quotations from the appellant’s evidence. It contains incomplete sentences. The paragraph numbering in the decision is not consecutive. These features mean that the decision is not easy to read. They may have diminished the confidence that a more conventionally written decision might have produced in the applicant that the FTS had considered his case with care. Notwithstanding those difficulties I have concluded for the following reasons that the grounds of appeal do not raise any arguable and material points of law.
22. The FTS made findings which provide an adequate explanation for their refusal to award points under the following activities: 1, 2, 3, 4 and 6. Its findings at

paragraph 33 support a conclusion that the applicant could prepare and cook a simple meal unaided. Its findings at paragraph 30 support a conclusion that he could take nutrition unaided. Its findings at paragraph 29 support a conclusion that he could manage his medication unaided. On his own evidence he forgot it on average about once a week, and did not do so most of the time. The findings at paragraph 31 supported conclusions both that he could wash and bathe unaided and that he could dress and undress unaided. The FTS noted his evidence that he was presentable for work and that he would get washed and dressed before he went out. Before turning to the matters raised in the grounds of appeal, it is relevant to note that the FTS provided adequate reasons for conclusions which meant that an award of no points in relation to any of those activities.

23. It is true that the FTS does not mention the ADHD assessment report other than by a single reference in paragraph 17, and it is also true that the ADHD assessment report post-dates the "Mair" report on which the FTS relied in making some of its findings. The FTS was, however, alive to the applicant's contention that the "Mair" report did not represent his current condition: see paragraph numbered 2 and headed "The Appellant's arguments". It rejected that contention, and made it clear that it did so largely on the basis of the evidence that the applicant himself gave at the hearing. The FTS was entitled to accept his evidence even if that conflicted with evidence in the ADHD assessment report.

*Ground 1(a)*

24. The ADHD assessment relates that the applicant could struggle with his emotional regulation and could become angry or upset quickly and over seemingly insignificant things. The ground of appeal suggests that had that part of the assessment been taken into account and accepted, it would have supported a finding that the applicant could not engage socially with other people due to such engagement causing either overwhelming psychological distress to him or causing him to exhibit behavior that would result in substantial risk of harm to him or another person. The passage in the assessment does not bear that weight. I note that the grounds of appeal presented to the FTS suggested only that the points for activity 9 descriptor (b) should be reinstated, although that would not have precluded the FTS from awarding points for descriptor (d) had it been satisfied that it should do so.



*Ground 1(b)*

25. Regulation 7(2) and (3) provides:

“(2) An individual’s ability to carry out an activity is to be determined –

(a) by reference to the descriptors for the activity set out in column 2 of the table in Part 2 of schedule 1, and

(b) on the basis of which descriptor applies for the individual to be able to carry out the activity –

[...]

(iv) within a reasonable time period.

(3) In this regulation –

[...]

(d) “reasonable time period” means no more than twice as long as the maximum period that an individual without a physical or mental condition or conditions which limits that individual’s ability to carry out the activity in question would normally take to complete that activity.”

The passage in the ADHD assessment on which the appellant relies here is in very general terms, and is not associated explicitly with any of the activities in respect of which the applicant said he was entitled to points. In submissions the applicant’s solicitor suggested that the FTS should have made findings on how long it would take the applicant to complete tasks such as cooking, washing or dressing. In the context of the findings that the FTS did make at paragraphs 31 and 33, that is not arguable. The FTS accepted the applicant’s evidence that he timed his rising from bed dependent on when he had to leave the house, and that he was able to wash and dress before he went out so that he was presentable for work. In relation to cooking the FTS accepted the applicant’s evidence that he would focus more when he was cooking for someone else, and that when he had little time to get ready, that kept him on track. The FTS also found, at paragraph 28, that the applicant to get to work on time, most of the time.

*Ground 1(c)*

26. The FTS findings about the ability of the applicant to take nutrition, at paragraph 30, again based on the oral evidence of the applicant at the tribunal. This ground does not raise an arguable point of law.

*Ground 1(d)*

27. The FTS found that the applicant's limitations in academic life were materially more than those involved in his day-to-day activities, but found that he was able to cope with academic life without support. It is not in any event clear from the ground of appeal what bearing, as a matter of law, those limitations would have on the tribunal's consideration of the activities and descriptors in Schedule 1 of the ADP regulations. This ground does not raise an arguable point of law.

*Ground 3(a) and (b)*

28. The tribunal was plainly aware that the applicant had worked in different jobs and made a number of findings under reference to different jobs he had held. The applicant submitted that the FTS should have made a finding as to whether the applicant was able to work on more or less than fifty per cent of the days in the year, under reference to regulation 10(3) of the ADP regulations. There is, however, no submission that there was evidence before the FTS to support the proposition that the applicant had been unable to work for less than fifty per cent of a year. The findings with regard to social engagement were made not just with reference to bar work, but work in advocacy and at a community centre, and also in relation to his life as a student. Neither of these grounds raises an arguable point of law.

Lady Carmichael

Member of the Upper Tribunal for Scotland

29 April 2024