IN THE UPPER TRIBUNAL **Appeal No. CPIP/1627/2020**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

AC

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decision date:
Decided on consideration of the papers

Representation (written submissions only):
Appellant: Mrs S Philipson, Citizens Advice Gateshead
Respondent: SA Powell, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 23 January 2020 under number SC230/18/00479 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **The First-tier Tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.**
2. **The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 23 January 2020.**
3. **Copies of this decision should be included in the appeal bundle before the panel of the First-tier Tribunal dealing with the remitted appeal.**
4. **In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: R(DLA) 2 & 3/01.**

5. **If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction 4 above).**
6. **The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Background

1. This appeal concerns the decision of the First-tier Tribunal sitting at Leeds on 21 January 2020 (the **"Tribunal"**) to refuse the Appellant's appeal and to confirm the Respondent's decision dated 07 (or possibly 09) August 2019 that the Appellant was not entitled to any award of Personal Independence Payment because he did not satisfy the conditions to entitlement (the **"FtT Decision"**).

2. The Appellant had been in receipt of Disability Living Allowance with the mobility component at the higher rate and the care component at the middle rate due to health difficulties including Asperger's Syndrome and Prader Willi Syndrome. As part of the conversion process whereby claimants are being migrated from Disability Living Allowance to Personal Independence Payment the Appellant was invited to apply for Personal Independence Payment. His mother, who is his appointee, completed a claim form on his behalf and the Appellant underwent a face-to-face assessment at home with a healthcare professional. Following receipt of the healthcare professional's report the decision maker for the Respondent awarded the Appellant no points under any of the descriptors in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the **"PIP Regulations"**).

3. The first hearing of the appeal before the First-tier Tribunal was adjourned because the panel considered it in the interests of justice to give the Appellant an opportunity to obtain and submit copies of his medical records and to give the Appellant another opportunity to attend an oral hearing (his not having been willing to attend the first hearing due to anxiety).

4. By the time of the oral hearing on 23 January 2020, as well as the Appellant's claim form, the HCP report, the decision under appeal and the mandatory reconsideration letter, the Tribunal had before it documents relating to the Appellant's Disability Living Allowance history, copies of the Appellant's GP records and hospital letters, a letter from his mentor at the North East Autism Society, and extensive written submissions from his representative at Citizens Advice Gateshead. At the hearing, which took place by telephone, it heard oral evidence from the Appellant's appointee as well as from the Appellant himself. It also heard submissions from a presenting officer for the Respondent.

5. The Tribunal refused the appeal. The Appellant disagreed with the FtT Decision and, having considered the statement of reasons provided by the Tribunal, applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal.

The permission stage

6. Permission to appeal was refused by a salaried judge of the First-tier Tribunal. The Appellant then exercised his right to renew the application before the Upper Tribunal and the application came before me. I granted permission to appeal.

7. In my decision granting the application I said:

> "9. The grounds of appeal say that the Tribunal failed to consider the evidence provided by the North East Autism Society. I don't accept that this is a valid criticism. There is a difference between not considering something and not accepting it. The Tribunal had clearly read the communications from the North East Autism Society, as it referred to them and paraphrased them throughout its statement of reasons, so it isn't true to say that they failed to consider them. Similarly, in the grounds of appeal it is argued that the Tribunal dismissed the Respondent's presenting officer's submissions on the appropriate scoring for some descriptors "without due consideration". The Tribunal acknowledged in its statement of reasons the position that the presenting officer took, suggesting that the Appellant may be entitled to 2 points in respect of daily living descriptors 2 (taking nutrition), 4 (washing and bathing) and 6 (dressing and undressing), but it clearly did not agree with his suggested scoring. Again, the Tribunal acknowledged (in paragraph 31 of its statement of reasons) that the Appellant had started a 4 year course at Newcastle University which was tailored for him, but he didn't finish that course. It clearly did consider the evidence, and indeed accepted it, but it didn't infer from that evidence what the Appellant's representative thinks it should have done.
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> 10. The Tribunal was not required to accept all the evidence – indeed it couldn't have done, as some of the evidence was in conflict. A very important part of the Tribunal's role was to weigh each piece of relevant evidence and resolve any conflicts, deciding what was most likely in the light of the evidence as a whole, and making findings of fact accordingly. The Upper Tribunal should be slow to interfere in the First-tier Tribunal's role weighing and assessing evidence and finding the facts. The Upper Tribunal shouldn't interfere in this aspect of decision-making unless the First-tier Tribunal's decision making is outside the whole range of reasonable decisions available to it on the evidence, or was based on a misunderstanding or misapplication of the law, or conducted proceedings in a way which was procedurally unfair. To understand what the Tribunal decided, and how and why it decided things that way, one must look to its decision notice and statement of reasons.
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> 11. The Tribunal's statement of reasons is reasonably lengthy, running to some 12 pages. It proceeds methodically through the descriptors claimed by the Appellant and his representative, first reciting the evidence and submissions it read and heard in relation to the activity in question, and then setting out the findings of fact it made based on the evidence and giving its

scoring of the activity, which in each case was that the Appellant scored no points.

12. Despite the thoroughness with which the Tribunal summarised the evidence and submissions given, I am satisfied that it is arguable with a realistic prospect of success that it may have failed to explain with adequate clarity how it evaluated that evidence, including why it rejected some of the evidence given by the Appellant, his mother, and Ms Gargett of the North East Autism Society, about some of the difficulties that they said the Appellant experiences carrying out tasks. Such a failure would itself amount to an error of law.

13. The Tribunal may also have placed too much weight on the evidence of what the Appellant could do (such as playing Warhammer games and painting Warhammer figures), and insufficient weight to the evidence of tasks with which he struggled, and it may be that it drew inferences about other tasks that the Appellant should be able to do that were not supported by the evidence as a whole. The Tribunal found that the Appellant could engage face to face with unfamiliar people in the context of visits to the Warhammer shop and participation in Warhammer competitions, and it decided that "if the Appellant chose to do so he could socially engage with those he wished to mix with for example in competition or locally with his friends from school", awarding no points accordingly. The Tribunal may have erred in finding that the ability to engage socially in such a specific context was sufficient for it to conclude that he was capable of performing the activity.

14. The Tribunal may also have failed adequately to apply, or may have misunderstood, the requirements of Regulation 4(2A) of the PIP Regulations, which provide that a claimant is to be assessed as satisfying a descriptor only if he or she can do so safely, to an acceptable standard, repeatedly and within a reasonable time period.

15. I note, in particular, that the Tribunal accepted that "occasionally the Appellant would choke" when eating but found that "this did not occur on a regular basis" (paragraph 47 of the statement of reasons) and awarded no points, despite the presenting officer for the Respondent having indicated that "there may well be entitlement to 2 points on nutrition on grounds of choking".

16. The word "safely" is defined in Regulation 4(4) of the PIP Regulations as follows:

> ""safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity"

The Tribunal may have substituted a test of "regularity" in place of the proper test of "likely", and this may be an error of law.

17. Given the nature of the potential errors I have identified I cannot be confident that the errors, if made, would not have been material to the FtT Decision. In other words, I can't be confident that the outcome of the appeal wouldn't have been different had those errors not been made. This warrants a grant of permission to appeal to the Upper Tribunal. My grant of permission is unrestricted."

The Respondent's position on the appeal

8. In response to my case management directions the Respondent made submissions on the appeal, supporting the appeal on the basis that the Tribunal had failed adequately to explain its decision making in relation to the Appellant's mobility needs. She invited me to set aside the FtT Decision and remit the matter to be heard by a fresh panel of the First-tier Tribunal.

Why there was no oral hearing of the appeal

9. Neither party asked for an oral hearing and, having reviewed the papers, I was satisfied that the interests of justice didn't require one and the overriding objective would be furthered by my determining the appeal on the papers to avoid further delay.

Why I have allowed the appeal

10. At the permission stage I had to be satisfied only that it was arguable with a realistic, as opposed to fanciful, prospect of success that the Tribunal erred in law in a way which was material. At the substantive appeal stage I have to be satisfied that it did in fact err in such a way.

11. It was accepted by the parties that the Appellant had a diagnosis of Asperger's Syndrome, which is an autistic spectrum disorder (**"ASD"**). The Appellant's case was that the symptoms of this condition had a marked impact on his ability to plan and follow the route of a journey to the standard required by the PIP Regulations. Susan Garett of North East Autism Society wrote a letter in support of the appeal explaining that she had supported the Appellant since August 2018. In her later she gave evidence as to the impact of his ASD on his ability to manage being in new or crowded situations and his ability to travel independently:

> "[The Appellant] could not attend an interview at the assessment centre as he does not cope well in crowded situations and is very noise sensitive and anxious of new situations." See page 293 of the FtT appeal bundle.
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> "Traveling (sic) is another challenge [the Appellant] faces he is always brought and picked up from appointments and accompanied when out and about. [The Appellant] can plan a journey but may not be sure of how to get home if things go wrong, his first thought would be to ring mum (his support network). So independent travel is limited to very familiar journeys and support is usually needed." See page 294 of the FtT appeal bundle.

12. In MH v SSWP [2016] UKUT 0531 (AAC) (**"MH"**) a three-judge panel of the Upper Tribunal determined that overwhelming psychological distress is relevant to PIP mobility descriptors 1(d) and 1(f), albeit that the threshold for establishing "overwhelming psychological distress" is a very high one and will not be satisfied by a claimant merely feeling "anxious", "worried" or "emotional". They said:

> "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, make progress. Thus descriptors 1d and 1f might be satisfied by a person liable to suffer from overwhelming psychological distress when out walking. There is a potential overlap between descriptor 1b on the 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 issue of 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 the route safely, to an acceptable standard, repeatedly and within a reasonable time period, the fact that a claimant suffers psychological distress which 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 1b or 1f because they could in fact complete journeys unaccompanied without being overwhelmed."

13. The Appellant's representative said that the Appellant suffers from "overwhelming anxiety attacks on a regular basis which causes (sic) him to experience panic attacks and chest pain" (see page 301 of the FtT appeal bundle). This claim was sufficient to engage the issue of overwhelming psychological distress. The Tribunal didn't have to accept what the representative claimed as being true but it was obliged to explain what it made of it, to make relevant findings of fact, and to address whether what the Appellant experienced amounted to "overwhelming psychological distress". Its failure to do so amounts to an error of law which may well have been material (the problem with inadequacy of reasons being that we cannot know).

14. Further, while the Tribunal had a broad discretion as to how it should weigh the evidence, what findings it should make based on it, and what inferences it should draw from the facts found, I am satisfied that in this case the Tribunal erred in its approach to the descriptors. The Tribunal placed a disproportionate emphasis on the Appellant's ability to participate in activities connected with Warhammer gaming, and it drew impermissible inferences from his ability to carry out those activities on which it based its decision that he was entitled to no points under any of the PIP descriptors.

15. The Tribunal should have considered the evidence in the round. It should have addressed the evidence of what the Appellant said that he struggled with, and it should have been cautious, given the nature of ASD, about inferring from his ability to carry out a task in a very specific context that he would be able to carry out that task in other contexts. Just because he was found to be able to engage face to face with people he doesn't know at the Warhammer shop, it doesn't necessarily follow that he would be capable of engaging with unfamiliar people face to face more generally (including with people who are not part of the wargaming subculture).

16. Further, I am satisfied that the Tribunal erred in its approach to the requirement in Regulation 4(2A) of the PIP Regulations that a claimant is to be assessed as satisfying a descriptor only if he or she can do so "safely". Instead of considering whether the Appellant could carry out activities in a way which was "unlikely to cause harm" to him or another person "either during or after completion of the activity" (see the definition of "safely" in Regulation 4(4) of the PIP Regulations), it applied a test of

whether problems arose “on a regular basis”. This was not the correct test. While this error was apparent only in relation to the Tribunal’s consideration of the activity of taking nutrition it is likely that the same misunderstanding applied when it was assessing all other activities.

Disposal

17. Since the FtT Decision involved the making of a material error of law it is appropriate to set it aside.

18. Further facts need to be found and the First-tier Tribunal is best placed to find them. I therefore remit this matter to be reheard by a panel of the First-tier Tribunal in accordance with the Directions set out above.

Thomas Church
Judge of the Upper Tribunal
Signed on the original on 17 August 2021